

SOCIAL SECURITY
ADVISORY COMMITTEE

**Decision Making and Mandatory
Reconsideration**

**A study by the Social Security Advisory Committee
Occasional Paper No. 18**

July 2016

About this report

This project was conducted as part of the Social Security Advisory Committee's (SSAC's) Independent Work Programme, under which the Committee investigates pertinent issues relating to the operation of the benefits system.

We are grateful for the assistance of our policy analyst, Henry Parkes, who prepared the paper for us, and to officials from the Department for Work and Pensions (DWP) and HM Revenue and Customs (HMRC) who provided factual information. As ever, we are also grateful to our extensive stakeholder community for their active engagement with this project.

However, the views expressed and recommendations reached in the report are solely those of the Committee.

Scope of the project

Although we had set out to consider decision making at both DWP and HMRC, it should be noted the emphasis has been placed on DWP – reflecting both the content of consultation responses and the importance of DWP in the delivery of social security benefits relative to HMRC. To note we have not considered decision making at the Department for Communities (DfC) in Northern Ireland, primarily since Mandatory Reconsideration (a focus of this report) had not been introduced in Northern Ireland when this research was carried out. However a number of these recommendations we have made may apply there as well.

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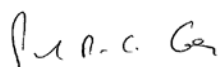
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Foreword

Decision making, and especially the exercise of discretion, is at the very heart of social security practice. For most benefits, and increasingly, it is how eligibility is determined, entitlements established and payments made. Changes in claimant circumstances and the requirement to routinely review the appropriateness of continued receipt of benefit all require that decisions are taken by staff at the Department for Work and Pensions (DWP), Department for Communities (DfC) in Northern Ireland and HM Revenue and Customs (HMRC). Many decisions are complex, involving the appraisal of much evidence, and the consequences can be dramatic for the claimant and any dependents they may have. Every year, 12 million decisions are made by DWP staff and for the most part they are not contentious – in other words, the decisions are accepted by the claimant as being fair and accurate. However a small proportion of decisions are not met with agreement by the claimant and many of these are subject to challenge and review. This is both concerning for the claimant who may need support with living costs and costly to the Exchequer in terms of dispute resolution.

In particular, we have sought to examine the impact of *Mandatory Reconsideration*, the recent appeals reform introduced with an objective of resolving disputes earlier and reducing demand on the tribunals service. This has not been without controversy, with some criticising the operation of the policy. In order to better understand the issues, we launched a stakeholder consultation in February 2016 that yielded over 80 submissions. This was a considerable response that highlights the importance of this issue. We have carefully considered these submissions, along with other evidence available to us, to inform our understanding of the effectiveness of decision making and how it might be further strengthened.



Paul Gray
Chair

1. Introduction

The delivery of social security payments, on which many people in our society depend, including some of the most vulnerable, is the outcome of a lengthy process. It begins with policy development, Ministers and their officials devising benefits and reforms to address perceived problems and needs. This is then translated into legislation, both primary and secondary, that provides the legal basis for the government to act. This must then be implemented on the ground. All decisions at the Department for Work and Pensions (DWP) regarding entitlement are, in theory, made by the Secretary of State, but in practise are made by officials on their behalf,¹ referred to as 'decision makers' (DMs). Caseworkers perform the equivalent function at Her Majesty's Revenue & Customs (HMRC) on behalf of their Department.²

DMs must have appropriate and adequate skills, guidance and training to carry out this role effectively, accurately interpreting often complex laws and making decisions that are based on suitable evidence. In carrying out this task, DMs do not operate in a vacuum; their capability in part determined by the effectiveness of process management and oversight. Millions of such decisions are made by DWP, DfC³ and HMRC every year, many of which are of great importance for those involved. *Will I be determined fit for work? Will I still qualify for Tax Credits that top-up my income so I can pay my bills?* Inevitably, government decision makers do not always get this right and the consequences are potentially significant for the individual and certainly for the Exchequer. In 2013/14, costs of appeals to the DWP alone were just short of £70m.⁴ Much of this could be avoided if decisions were of a higher quality and better understood by claimants. Recent reforms of the appeals process, primarily the introduction of *Mandatory Reconsideration (MR)* before appeal, have set out to achieve just that; however there are questions about how successful this process has been.

This study seeks to understand the decision making process in more detail, largely hidden from view but of utmost importance for those who depend upon its effective operation for their livelihood. We wish to consider the process of Mandatory Reconsideration in detail and understand better the barriers to more effective decision making at DWP and HMRC.

¹ This is referred to as the Carltona Principle

² Henceforth all HMRC caseworkers and DWP decision makers will be referred to collectively as decision makers.

³ This is the Department for Communities in Northern Ireland. We have not considered decision making in Northern Ireland in this report, but a number of our recommendations would be applicable there and should be considered.

⁴ [Employment and Support Allowance and Work Capability Assessments, 1st Report of the 2014-15 session, Work and Pensions Committee \(July 2014\)](#)

Due to our modest resource and the need for focus we have concentrated on Employment and Support Allowance (ESA) and Tax Credits. The project has involved a review of relevant evidence including desk research, analysing such official statistics as are available, the conduct of discussions groups and site visits with staff at both DWP and HMRC and an extensive consultation with our wider stakeholder community.

2. 'Right first time' and the importance of decision making

Why is decision making important? Why now?

The implementation of government policy is achieved through the day-to-day decisions made by officials on thousands of claims, throughout the UK. Working with their colleagues, healthcare professionals and claimants themselves, departmental decision makers are tasked with determining the eligibility and level of benefit to be paid to those making a claim. Their role is therefore critical to the delivery of social security benefits. Given the volume of decisions that are made every day, it is unreasonable to expect that mistakes can be wholly eliminated from the system or that disputes over the decisions will not arise. Therefore there is also a requirement for effective mechanisms to be put in place to review these decisions and provide redress where necessary. While review mechanisms are important, so too is high quality decision making that focuses on getting decisions "right first time".⁵ We outline below why accurate decision making is of utmost importance for the delivery of social security, and why in particular we have focused on this topic at this time.

Failures in decision making are costly to the taxpayer

Tribunals are a costly means of dispute resolution for the taxpayer. For ESA, the processing costs to DWP alone to both conduct an MR and prepare for tribunal is over £300m,⁶ with an additional cost to Her Majesty's Courts & Tribunals Service (HMCTS) of over £240m.⁷ Further costs arise from additional complaint handling, an increasing burden on the relevant Ombudsman⁸ and the Independent Case Examiner⁹. Taking a broader view, failures in decision making can increase costs to other government departments, local government and devolved administrations, for example through additional discretionary payments. Public bodies naturally focus on their own financial viability when allocating resources, but examining the wider picture of government spending, there are clearly financial returns to getting more decisions right earlier in the process. Where benefit is paid out to

⁵ [Right First Time - Administrative Justice & Tribunals Council \(June 2011\)](#)

⁶ [PQ 1297 to the Minister for Disabled People answered June 5th 2015](#)

⁷ This was the total cost to HMCTS of the Social Security and Child Support Tribunal divided by the number of cases in 2013/14, see [2013 Oral evidence presented to the Work & Pensions Select Committee by Kevin Sadler, HMCTS. See Q123](#)

⁸ The Parliamentary and Health Services Ombudsman provide complaint resolution in cases where 'an organisation has not acted properly or fairly or has given you a poor service and not put things right' including government departments.

⁹ The Independent Case Examiner reviews complaints about certain government organisations that deal with benefits, work and financial support.

claimants who should not be found eligible, this cost is also borne by the taxpayer.

Incorrect decisions undermine trust in government

Decisions on benefits should be credible, consistent and justifiable for citizens to trust that decisions are accurate and that they are made in accordance with the law. If citizens lose confidence in the decision making process, they are arguably more likely to dispute decisions, increasing the administrative burden on officials, reducing the time available to make each decision and compromising decision maker quality as a result. There is thus potential for a vicious cycle to emerge that further degrades the quality of decision making.

Failures in decision making can have negative consequences for claimants

Inaccurate decision making can cause claimants to lose out on their legal entitlements, resulting in hardship. Even where mistakes are rectified and back payments are made, claimants may experience 'knock-on' effects in the interim period, for example increasing personal debt through short-term loans, building up rent arrears and suffering ill health due to additional stress. Such outcomes can present a barrier for claimants in moving closer to the labour market. For Tax Credit recipients, it may be that the withdrawal of Tax Credits leads them to be better off on out of-work benefits.

It is especially important to consider decision making standards at this time for a number of reasons:

The scale of the welfare reform challenge ahead

As the government presses ahead with “the most far-reaching programme of change that the welfare system has witnessed in generations”,¹⁰ many more, and different types of decisions, will be required to deliver the intended reform. The continued rollout of Universal Credit (UC) in the next few years will considerably expand DWP’s role in the lives of millions of people, and so it will be important that correct and timely decisions are made regarding their entitlement. Although UC has been designed with simplicity in mind for the end user, the inherent complexity of rolling six legacy benefits into a single payment presents operational difficulties and creates new challenges for DWP staff, including decision makers. The migration of Disability Living Allowance (DLA) claimants to Personal Independence Payment (PIP) will also present challenges. Many who would have had an indefinite award of DLA will now be required to apply for PIP which has different eligibility criteria and is subject to regular review. This creates further pressure on decision makers.

¹⁰ [Universal Credit: Welfare That Works, Foreword by the Secretary of State, DWP, 2010](#)

The Scotland Act 2016 transfers responsibility to the Scottish Government for a range of benefits, including DLA/PIP and Attendance Allowance which is currently unchartered territory for officials in Scotland. This is a clear challenge for all involved in making this transition, and a need for strong inter-governmental cooperation.

Removal of legal aid and the strain on welfare advice agencies

Following the passing of the *Legal Aid, Sentencing and Punishing of Offenders Act 2012 (LASPO)* – legal aid for the purposes of social security advice has all but disappeared in England and Wales. There were only 458 cases during 2014/15, as demonstrated by data from the *Legal Aid Agency*.¹¹¹²

<i>Financial Year</i>	2011/12	2012/13	2013/14	2014/15
<i>Workload</i>	110,475	88,378	145	458

In Scotland where funding remains in place through the Scottish Legal Aid Board, there has been no significant reduction. In Northern Ireland, cuts to the NI Executive Budget have been passed on to NI departments which provide legal aid but the impact has been much smaller, due also to the decision of the Department of Justice not to reduce the scope of legal aid to the same extent as in England and Wales.

Since 2009, nearly 100 Citizens Advice offices have been lost in England and Wales through closure or merger,¹³ driven at least partially by cuts to local authority budgets and legal aid. Giving evidence to the Public Accounts Committee in December 2014,¹⁴ the Chief Economist of Citizens Advice estimated they had seen 120,000 fewer people as a result of reductions in legal aid. It is worth noting this has not occurred to the same degree in Scotland or Northern Ireland.

Although decisions to reduce advice budgets are not the responsibility of DWP or HMRC, an increase in the number of claimants who are unsupported as they make their claims has implications for decision making throughout the claimant journey, including redress. Those who are supported at tribunal are around 34 per cent more likely to be successful at Tribunal than those

¹¹ [Legal Aid Statistics in England and Wales 2013-14,](#)

¹² [Legal Aid Statistics in England and Wales. April-June 2015](#)

¹³ [Gillian Guy of Citizens Advice on moving with the times – Article in *Third Sector* \(March 2015\)](#)

¹⁴ [Implementing Reforms to Civil Legal Aid, Evidence Session At 9.45am, Thursday 4 December 2014](#)

unsupported, according to HMCTS statistics, and this is as high as 50 per cent in some areas.¹⁵

At the same time as the capacity to provide state support for representation of claimants is declining, the government has announced a plan to increase the proportion of DWP Presenting Officers in ESA and PIP cases from 2017.¹⁶ In some cases, claimants may not be able to access the support they require and this makes the government's task of accurately determining eligibility more challenging.

Recent reform of the appeals process

From October 2013, the Government introduced appeals reform for all DWP-administered benefits, with Tax Credits and Child Benefit following suit in April 2014 at HMRC. This included the policy of *Mandatory Reconsideration (MR)*, a requirement that prior to progressing to a tribunal to dispute a decision, claimants must first ask the Department formally to reconsider it. Once this has happened, a *Mandatory Reconsideration Notice (MRN)* is issued outlining the outcome of the review and reasons for this. This must be submitted alongside additional paperwork to HMCTS in order to lodge an appeal.

The policy was introduced with the following stated objectives:¹⁷

- to resolve disputes as early as possible;
- to reduce unnecessary demand on HMCTS by resolving more disputes internally;
- to consider revising a decision where appropriate;
- to provide a full explanation of the decision; and
- to encourage claimants to identify and provide additional evidence that may affect the decision, so that they can receive the correct decision at the earliest opportunity.

The introduction of the policy has coincided with a dramatic reduction in the number of appeals going to tribunal across the benefit system.¹⁸ Although there may be a number of factors driving this, concern has been raised by stakeholders that the new process is not always working as well as it should and that it may cause claimants, particularly those who are vulnerable, not to appeal even when they appear to have a strong case.

¹⁵ [FOI Release: Social Security Appeal Tribunals and Representation Statistics, Ministry of Justice \(March 2013\)](#)

¹⁶ [Budget 2016, HM Treasury See Page 103 \(2016\)](#)

¹⁷ [Appeals Reform: An Introduction. DWP, \(August 2013\)](#)

¹⁸ See p22-23 of this report

Previously, oversight of this reform would have been within the remit of a number of oversight bodies:

The winding up of relevant oversight bodies

In 2003, an independent *Decision Making Standards Committee* was established, tasked to monitor the quality of DWP decision making in GB. It reported to the Chief Executives of Jobcentre Plus, the Pensions Service and the Disability and Carers Service. The Committee had three main objectives:¹⁹

- to provide independent advice to senior executives on whether reports on the standard of benefit decision making were accurate;
- to identify and make recommendations on the areas where standards could be improved; and
- to look at specific issues raised by the Agency Chief Executives that may have affected the standard of decision making.

The panel comprised a chair with three supporting members, each with significant experience in either legal or advice sectors.²⁰ Their main output was an annual report which identified issues, made recommendations and recommended milestones to enable the Department to move towards higher quality decision making.

The committee was abolished in GB in 2010, with oversight handed to the Administrative Justice & Tribunals Council (AJTC), an arm's length body of the Ministry of Justice (MoJ). As the 'statutory guardians of the needs of the administrative justice user',²¹ the Council had oversight over administrative decision making standards across government as well as access to redress in DWP. They published reports,²² responded to government consultations and sought to raise the profile of administrative justice issues. The Council was abolished in 2013 as it was the Government's view that its functions could be carried out from within the MoJ.²³ The subsequently established Administrative Justice Forum, that sits within the MoJ is also set to be abolished in April 2017.²⁴ This will leave no oversight of decision-making quality in GB. In Northern Ireland, the picture is somewhat different with an independent Joint Standards Committee, established in 1998, that seeks to

¹⁹ [Decision Making Standards Committee: What we do \(2009\)](#)

²⁰ [Decision Making Standards Committee: Who We Are \(2009\)](#)

²¹ [Future Oversight of Administrative Justice: The AJTC's response to the Justice Committee's report, Administrative Justice & Tribunals Council \(July 2013\)](#)

²² [See full list of AJTC Publications](#)

²³ [Written Evidence from the Ministry of Justice to the Justice Committee 8th Report - Scrutiny of the draft Public Bodies \(Abolition of Administrative Justice and Tribunals Council\) Order 2013 \(2013\)](#)

²⁴ [Jodi Berg appointment to the Administrative Justice Forum extended - GOV.UK News Story \(May 2016\)](#)

advise the Social Security Agency of Northern Ireland and produces annual reports relating to decision making accuracy.²⁵

In light of these developments, it seems timely to explore departmental decision-making at DWP and HMRC.

Understanding the scale of the problem: difficulties assessing departmental performance

High quality decision-making is clearly an important aspect of benefit delivery and the achievement of administrative justice. However there is an inherent difficulty in determining departmental performance in this area. Although officials take millions of decisions every year on a wide range of benefits only a very small proportion of these are subject to external scrutiny through the tribunal system. It is both unrealistic and unnecessary for all decisions to be assessed for accuracy – and the data which are available to make this assessment have considerable limitations. We discuss these below.

Data from HM Courts and Tribunals Service (HMCTS)

Tribunal overturn rates are one possible metric on which departmental decision-making can be judged. These represent the proportion of decisions for which claimants have lodged their dispute to the First-tier Tribunal and had their decision changed as a result. There is considerable variation by benefit type and time period as the data below indicate for GB:²⁶

Social Security and Child Support Tribunal overturn rates by benefit

Benefit²⁷	2015/16 Q1	2015/16 Q2	2015/16 Q3	2015/16 Q4
AA	31%	29%	33%	27%
TC	52%	48%	46%	44%
ESA	58%	58%	58%	58%
IS	42%	43%	44%	45%
JSA	47%	40%	43%	43%
PIP	57%	60%	61%	63%
UC	32%	47%	47%	45%

²⁶ [Tribunals and gender recognition certificate statistics quarterly: January to March 2016.:](#)

²⁷ AA = Attendance Allowance, TC=Tax Credits, ESA=Employment and Support Allowance, IS=Income Support, JSA= Job Seeker's Allowance, PIP = Personal Independence Payment and UC=Universal Credit

In ESA, overturn rates have been consistently above 50 per cent and in Tax Credits the rate has been steadily decreasing over the past four quarters for which data are available.

There are a number of considerations that should be made when assessing what these numbers mean:

Overall they reflect only a very small proportion of decisions made: less than one per cent of social security claimants lodge appeals,²⁸ though this is still a considerable number: with 157,000 appeals heard in 2015/16.²⁹

A further helpful measure might be the number of decisions overturned by tribunal as a proportion of **all** decisions made, which would be a measure that more accurately reflects the work of the Departments and the true prevalence of poor decision-making. However, this may not be appropriate either since:

Some individuals may not pursue disputes where they would have a reasonable prospect of success, and reasons for this could include:³⁰

- Redress mechanisms being too complex or perceived as such, and a lack of advice to navigate the system.
- Lack of knowledge around their true entitlement, and so assuming they must be in the wrong.
- Lack of self-confidence to 'take on the state'. This may be an issue, especially with vulnerable groups, although the idea of a 'courtroom' setting in front of a Judge may be intimidating for anyone, particularly if unsupported.
- Scepticism that decisions can actually be changed.
- Poor health and fatigue, particularly where benefit application processes have already been time consuming.
- In some cases, such as in first time JSA sanctions, small financial amounts may be at stake that some claimants may feel are not worth pursuing.

²⁸ [Administrative Justice, Better Decisions, and Organisational Learning, Robert Thomas, Public Law \(2015\)](#)

²⁹ [Tribunals and gender recognition certificate statistics quarterly: January to March 2016](#)

³⁰ Some of these factors were outlined by Professor Robert Thomas who references D. Cowan and S Halliday, *The Appeal of Internal Review* (2003)

Of course, the converse also applies:

Individuals may not dispute decisions that are in their favour, even though they are not correct: as noted earlier in this report, higher quality decision-making does not necessarily imply higher expenditure, as it also means ensuring those who are not eligible for benefit are not able to make a successful claim. In some cases there is little incentive for claimants to dispute decisions that favour them, though in some cases claimants could be liable to repay if any error is determined to be the responsibility of the claimant. DWP does estimate the extent of overpayments of benefit due to official and claimant error, though these estimates do not specifically relate to failures in decision-making.³¹ At HMRC, error and fraud are also estimated.

Tribunals are inherently better positioned to make higher quality decisions.³² This could be argued on the following grounds:

- Tribunals benefit from the knowledge and experience of tribunal panel members with relevant expertise, that might not be affordable to involve regularly at earlier stages in the dispute.
- The inquisitorial nature of oral hearings is effective for drawing out information from the claimant, including evidence that has not been explored through the case papers. Their physical presence may help to assess credibility.³³

Where cases are finely balanced, there may not be an objectively 'correct' decision: some cases are not clear cut and subject to interpretation, therefore some tribunals may change a decision when others would not on the basis of the same evidence.

In summary, for all the reasons outlined above, there are some limitations in using tribunal overturn rates to assess decision making quality. High overturn rates are of course a cause for concern and they should be considered, but they cannot provide the complete picture. The *reasons why* decisions are overturned may also provide insight into decision making quality.

Feedback from tribunals: results from a DWP pilot

In 2012 the DWP launched a joint pilot with HMCTS, where primary reasons for judges overturning DWP decisions in GB were collected for the first time. Tribunal judges were asked to give a single high level reason for disagreeing with the original decision, “with the intention of providing insight and learning

³¹ [Fraud and Error in the Benefit System: Financial Year 2014/15 Estimates, DWP \(2015\)](#)

³² For details on the Tribunal Process, see Annex A, p70-71 of this document

³³ [Tribunal Decision Making: An Empirical Study, Professor Dame Hazel Genn and Professor Cheryl Thomas. \(2015\)](#)

with the intention of improving standards of decision-making and appeals processes in the future.” In addition, they provide some insight into decision-making quality.

Early results from the pilot, published in November 2012, refer to 28,000 appeals found in favour of the appellant and against DWP between 9 July 2012 and 31 October 2012. Taking out the 36 per cent of cases where no reasoning was provided by the judges, across all benefits:³⁴

- 63 per cent of cases were primarily overturned due to *cogent oral evidence* presented at the tribunal
- 23 per cent reached a different conclusion on the basis of what were *substantially the same facts*
- 13 per cent of cases were reversed as a result of *new cogent documentary evidence* being provided
- Only one per cent of cases were primarily overturned as a consequence of decision makers misapplying the law, or of significant errors being made in medical reports.

It should be noted that judges could only select a single reason, which may obscure these figures – for example they would not be able to record if both cogent oral evidence *combined with* new documentary evidence had been pivotal in the changing of the decision. It is also unhelpful that judges did not enter reasons for over a third of cases, which could introduce bias to the results. Judges were not compelled to provide a reason and the DWP suggested awareness of the pilot may have been low initially.

Despite these drawbacks, the data suggest that cogent oral evidence provided is critical to decisions being changed at tribunal. As mentioned previously, tribunals are better placed to obtain this than DWP; there is a question of whether better oral evidence could be elicited from claimants without the need for a costly tribunal setting.

Similarly for cases decided on new evidence, there may be scope for DWP to obtain the necessary evidence without the need for escalation to tribunal.

The Committee understands that this pilot has now ended and has become ‘business as usual’ for PIP, ESA and UC. We would welcome further publication of the findings to understand the changing character of tribunals following reform of the appeals process. No such exercise is carried out at

³⁴ [Social Security and Child Support Tribunal Hearings: Early Analysis of Appeals Allowed from Pilot Data, DWP \(November 2012\)](#)

HMRC and the Committee would encourage a similar programme to be launched there to better understand why decisions are overturned there as well.

We recommend publication of further results from the ongoing DWP feedback exercise and for HMRC to launch its own pilot to understand better why decisions are overturned.

Estimates of error and fraud

DWP

The DWP measures the level of error and fraud in the benefit system:

‘Estimates are produced by statistical analysis of data collected through continuous survey exercises, in which independent specially trained staff from the Department’s Performance Measurement team, review a randomly selected sample of cases each year.’³⁵

Between April 2014 and March 2015 over 23,000 benefit claims were sampled and reviewed by DWP’s Performance Measurement (PM) team.³⁶

The results are calculated as a proportion of total benefit expenditure for each benefit, and are broken down between fraud, claimant error and official error. The results for the continuously monitored benefits in 2014/15 are as follows:

DWP Estimates of Fraud & Error 2014/15

	2014/15					
	Overpayments			Underpayments		
Benefit ³⁷	Fraud	Claimant Error	Official Error	Fraud	Claimant Error	Official Error
JSA	3.2%	0.4%	1.5%	0.0%	0.2%	0.9%
ESA	1.2%	0.8%	0.8%	0.0%	0.7%	1.2%
PC	1.8%	1.3%	1.5%	0.0%	0.7%	1.0%
HB	3.1%	2.6%	0.5%	0.0%	1.1%	0.3%

Although these figures give some sense of the scale of error in the system, there are a number of limitations to their use in assessing the accuracy of decision making.

³⁵ [Fraud and Error in the Benefit System: Technical Appendix for Calculation of the Total Gross Estimates and Net Loss Estimates, DWP, \(2015\)](#)

³⁶ [Fraud and error in the benefit system: financial year 2014/15 estimates, DWP, \(2015\)](#)

³⁷ JSA = Job Seeker’s Allowance, ESA = Employment and Support Allowance, PC = Pension Credit and HB = Housing Benefit

- It is clear that, not all ‘error’ would amount directly to failures in decision making and could come from a number of sources, for example clerical error or IT problems.
- The analysis only concerns the active caseload; any claimants found not to be entitled to benefit are out of scope for the Department’s audit. Put another way, the figures capture those awarded benefit who should not have been, but *not* those disallowed benefit who should have received it – for instance because they were incorrectly found fit for work.

It is a cause for concern that the Department does not seek to understand the accuracy of decisions where a claimant is found not to be entitled to benefit.

We recommend that DWP consider how it can include those found ineligible for benefit when assessing error.

Department for Communities (Northern Ireland)

The Standards Committee for Northern Ireland produces an annual report on the decision making standards of the Social Security Agency using a similar sampling methodology as used by DWP – reporting both on decision making accuracy (whether the right decision was made to award benefit in light of evidence and legislation) and financial accuracy – whether the correct *amount* of benefit was paid.³⁸

Standards Committee Error and Financial Accuracy Estimates 2014

	Sample Size	Percentage Error	Percentage Financial Accuracy
Disability Living Allowance	62	0%	99.6%
Employment & Support Allowance	120	0%	97.0%
Income Support	130	2%	98.9%
Jobseeker’s Allowance	144	1%	98.9%
State Pension	28	4%	99.8%
State Pension Credit	216	8%	98.1%

Again, it should be noted that if claimants are incorrectly found fit for work or denied a particular benefit incorrectly, they cannot be in the sample and so such an error could not be identified.

³⁸ [Social Security Agency Annual Reports on Decision Making and Financial Accuracy 2014, Social Security Agency, Northern Ireland \(2015\)](#)

HMRC

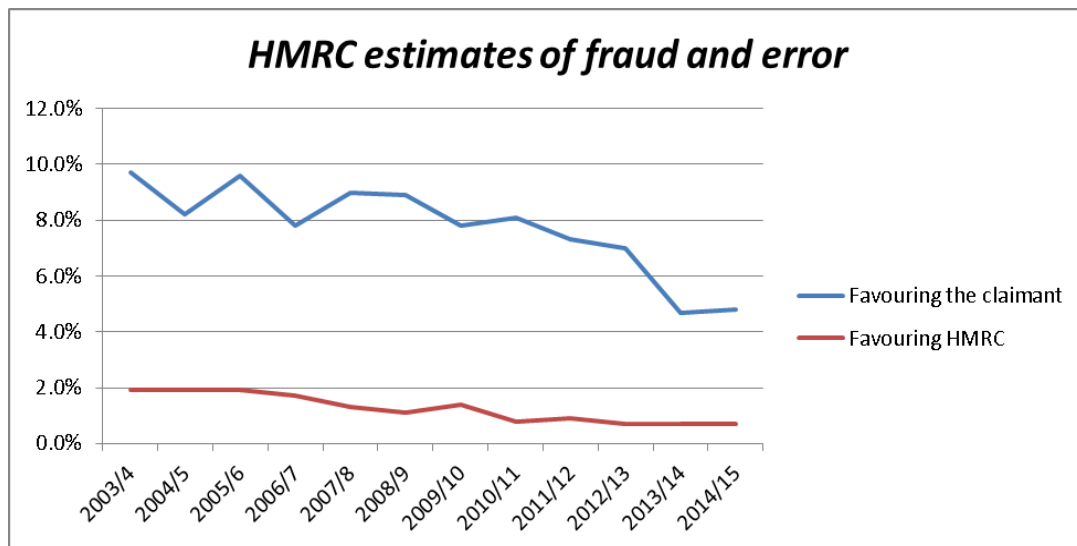
HMRC also measure fraud and error in the award of Tax Credits. The central estimates for 2014/15, expressed as a proportion of finalised entitlement are as follows:³⁹

HMRC Estimates of Error and Fraud 2014/15

	In favour of the claimant	In favour of HMRC
Error	3.1%	0.7%
Fraud	1.7%	0.0%

Only 1% of error that favours the claimant is HMRC error, with 16% of error that favours HMRC being due to HMRC.

These figures are at an all-time low, both errors favouring the claimant and HMRC have been steadily declining since the introduction of Tax Credits. Recent developments driving this change are: the increased use of Real Time Information and moves to make it easier for claimants to notify relevant changes in circumstances as well as increased compliance efforts.⁴⁰ The chart below shows this downward trend.



³⁹ [Child and Working Tax Credits: Error and Fraud Statistics 2014/15, HMRC \(2016\)](#)

⁴⁰ For more information on the Tax Credit Journey, see Annex A pages 71-75 [Tackling Fraud, Error and Debt in the benefits and Tax Credits system, HM Government \(March 2015\)](#)

International comparisons

Differences in how each country defines and measures fraud and error hinder international comparisons. However a 2014 study of seven OECD⁴¹ countries, including the UK, show that the average level of fraud and error in means tested benefits is around 5–10 per cent of overall benefit expenditure, 1–2 per cent in unemployment benefits and 0.1–1 per cent in old age pension benefits and child benefits.⁴² The UK is therefore not dissimilar to the position of the other countries in the sample.

Beyond decision making accuracy: claimants' experience of decision making and appeals

Data from the *DWP Claimant Service Experience Survey (2013)* of around 6,000 claimants (conducted between July-September 2013) suggests many claimants are not wholly satisfied with various aspects of the decision making and appeal process:

- 33 per cent were dissatisfied with the service they received when appealing a decision around their benefit entitlement.
- 50 per cent were dissatisfied with the appeals process more widely.
- 40 per cent felt the Department had not given adequate information about steps to take if dissatisfied.
- 52 per cent of claimants who had experience of a having a decision explained to them felt the decision was not very clearly explained.
- 61 per cent of those claimants following an enquiry felt they were not kept up to date with their progress.

There is an inherent negative bias in these figures; it is to be noted that a significant driver of any stated dissatisfaction could be that the claimant has had to engage in the process at all, and thus there will always be some negative responses. That said, it is a cause for concern that so many claimants are of the view they are not provided adequate information to understand clearly how a particular decision has been reached, to dispute it if necessary and to know how their case is progressing should they challenge the decision.

The most recent data (February 2016) included claimants for PIP and UC for the first time. The survey does not contain the same specific questions as the

⁴¹ The Organisation for Economic Co-Operation and Development

⁴² [The Economic Cost of Social Security Fraud and Error, RAND Europe, \(2014\)](#)

previous report, therefore in most cases results cannot be directly compared. However the data available show that:

- 45 per cent felt their decision was not *very clearly* explained. However a smaller proportion (11%) said they felt their decision was poorly explained or not at all.

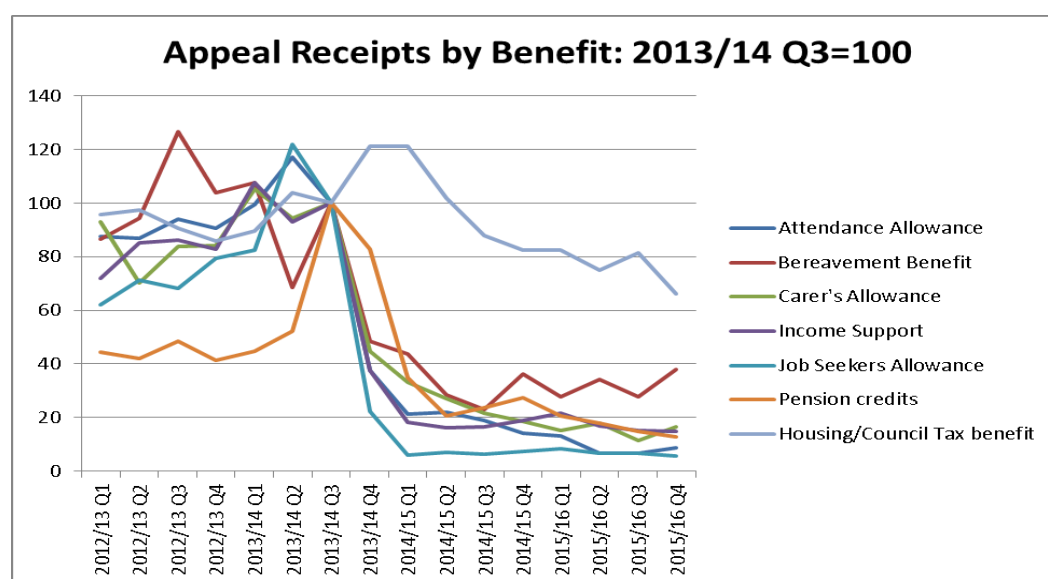
- 30 per cent thought they were not kept up to date with the progress of their case during a 'transaction'. This is not directly comparable to the figure above as the definition of transaction is much broader, referring to *any* interaction with DWP and not just appealing a benefit decision.

As such, the claimant research indicates considerable room for improvement in the appeals journey and decision making more generally.

3. A focus on Mandatory Reconsideration

The impact on appeals

There are concerns from stakeholders that the introduction of Mandatory Reconsideration has deterred some claimants from pursuing disputes when they would have done so under the previous system and would have been successful on appeal. The data from HMCTS certainly indicate a marked decline in the number of tribunal receipts following the introduction of MR across a range of DWP-administered benefits.⁴³ Tribunal receipts⁴⁴ for Housing Benefit/Council Tax Reduction, which have not been subject to MR, have seen no such dramatic decrease.

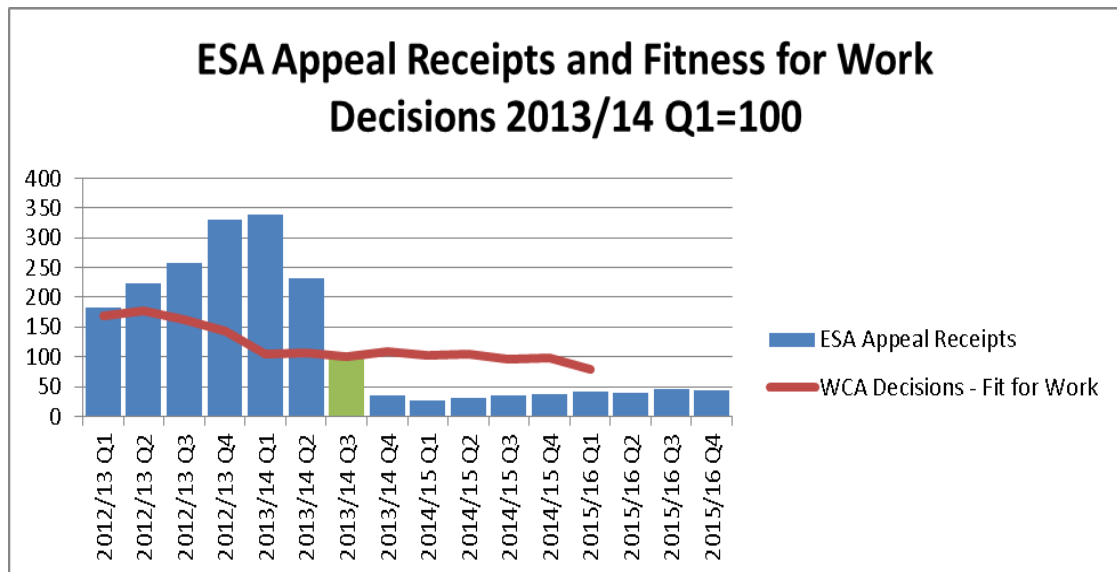


Considering ESA separately, it should be noted that ESA appeals were already falling from their 2012/13 Q2 peak prior to the introduction of MR. This may have been driven by a decline in the number of people who have been determined as fit for work in the work capability of assessment.⁴⁵

⁴³ [Data from Tribunal and gender recognition statistics quarterly: January to March 2016 \(2016\)](#)

⁴⁴ This is the number of tribunals for which a claimant applies which are accepted by Her Majesty's Courts & Tribunals Service

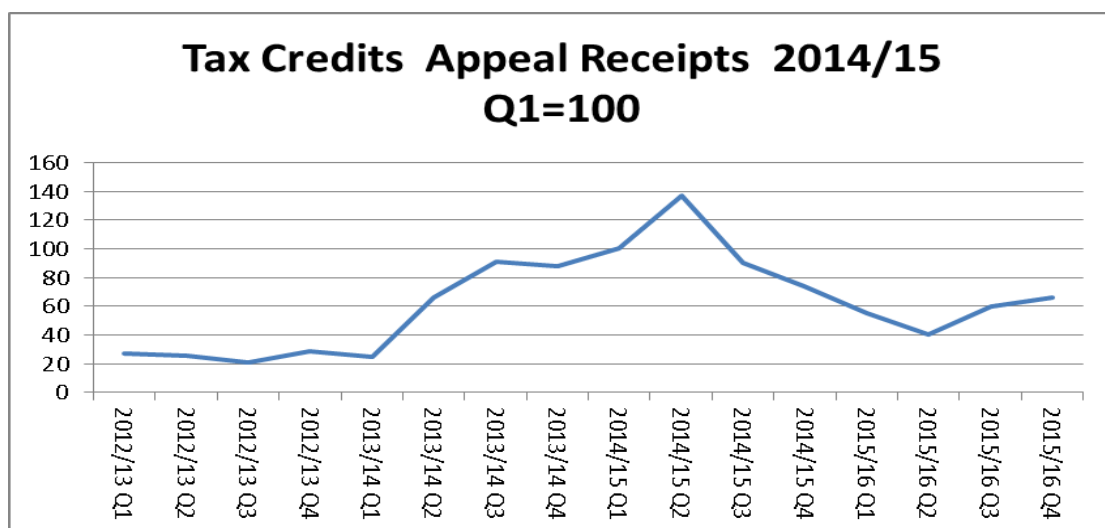
⁴⁵ [ESA: outcomes of Work Capability Assessments: claims made to Jun 2015 and appeals to Dec 2015 – DWP \(2016\)](#)



Although we cannot observe what would have happened if MR had not been introduced, it seems likely, in light of data on other benefits, that ESA appeal receipts would have been higher in the absence of the reform.

At HMRC, MR was introduced in April 2014. Appeals actually increased in the first instance but have now fallen, although they remain above levels seen in 2012-13

*Tax Credit tribunals receipts over time*⁴⁶



It was argued by the 2010-2015 coalition government that such decreases in appeal numbers suggest that the policy has been a success.⁴⁷

⁴⁶ [Data from Tribunal and gender recognition statistics quarterly: January to March 2016 \(2016\)](#)

⁴⁷ [See Written Question 907921 to DWP, responded to on the 9th March 2015](#)

We are confident mandatory reconsideration is already having a positive effect on the resolution of disputes. Appeals against ESA decisions decreased by 86% in July to September 2014 compared to the same quarter in 2013

**Minister for Disabled People
9 March 2015**

If these reductions have arisen purely due to disputes being resolved earlier, then the Committee would be inclined to agree with the Minister's statement. However, evidence from our consultation indicates the process is not always working as intended, and the problems identified by stakeholders may be behind some of the reduction in appeal numbers. It is of concern to the Committee if the new process fails to provide proper access to redress for claimants.

Perception of complexity of the overall process

Stakeholders have told us that claimants find the appeals system overly complex and difficult to follow, particularly for vulnerable claimants and those unassisted.

We believe that the majority of our customers find the appeals process extremely daunting and difficult to navigate, and the mandatory reconsideration has only added another level of confusion. Many vulnerable customers have advised that without assistance they would have given up.

The Wheatley Group

A percentage of appellants will give up. This is happening with mandatory reconsideration. It duplicates an existing power. It prolongs and confuses the appeal process and it acts as a deterrent to appellants who may have legitimate grievances.

Tribunal Judge

Evidence from DWP's own research, the *Claimant Experience Survey 2014/15* supports this view, looking at ESA claimants in particular: with 43 per cent of respondents finding the process of appealing an ESA eligibility benefit decision *very complicated*, with a further 22 per cent believing it to be *fairly complicated*. The researchers note that the it was "*perceived to be a lengthy,*

*complex, and error-prone process, involving staff who were not always equipped with the knowledge required...*⁴⁸

We recommend that the department(s) should identify and address the elements within the appeals process that claimants feel are too complex and consider further steps they can take to help claimants better understand the appeals journey.

Requesting a Mandatory Reconsideration

Time limits for MR

Claimants have one month⁴⁹ from the date of the original decision to request a Mandatory Reconsideration. Several issues have been identified with respect to time limits:

1. In some cases, a month is insufficient time for the claimant to get advice from a welfare advice service and then gather the evidence necessary – that may require making appointments with medical professionals who cannot see them within such short time scales. The time limit may thus be at odds with effective evidence gathering.
2. If time limits are missed the departments can use their discretion to allow 'reasonable' late requests. Stakeholders told us that in some cases late MRs have not been accepted despite having good grounds. There is no further means of dispute resolution beyond Judicial Review and so, for all practical purposes, claimants are denied access to redress. Previously it was the role of the judiciary to decide whether a late request should be allowed. Given their impartial status, this would seem fairer for claimants.
3. In notifications issued by HMRC, claimants are advised that if they disagree with a decision they should 'get in touch'. This message, in itself, is inadequate. It is not made clear to claimants that they are required to request a formal review and must do so within a strict time limit so as not to lose appeal rights.

⁴⁸ [DWP Claimant Experience Survey 2014/15, DWP \(2016\)](#)

⁴⁹ The time limit is 30 days at HMRC

In our experience, claimants are finding it difficult to get HMRC to accept late mandatory reconsideration requests particularly in cases where they have been in protracted discussions with parts of the Tax Credit Office to resolve their issue and only once that has failed have they submitted an appeal. For example, in a recent case, an adviser spoke to HMRC on five occasions in the four months following a HMRC decision to terminate a claimants Tax Credits for no apparent reason. The helpline advisers agreed it seemed to be in error and said it would be referred to the TCO for reinstatement. This dragged out for four months and eventually when nothing happened (despite five reassurances that action was being taken to correct the error) the adviser tried to lodge a mandatory reconsideration request which HMRC refused as it was late.

Low Incomes Tax Reform Group

We recommend time limits for requesting a Mandatory Reconsideration are clearly communicated in both departments.

We recommend that DWP and HMRC consider whether current time limits for requesting an MR and submitting evidence are conducive to effective evidence gathering.

The need for multiple requests

Where claimants are dissatisfied with an outcome, there may be multiple aspects of a decision they are challenging, all of which must be changed to get the outcome that is sought. However they may unknowingly only raise an MR about one aspect of their decision, leaving them unable to dispute the other important aspects within the time limits.

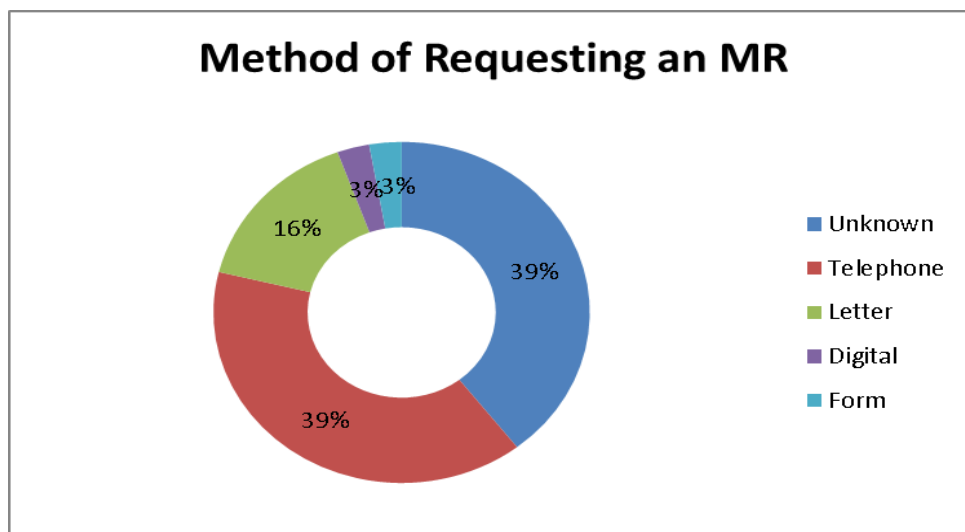
I experience particularly worrying problems where there are a number of related decisions regarding the same issue. Appellants simply do not understand that although the issue appears to be the same there are in fact two or three or more decisions ... In ESA there may be a right to reside and failure of medical or failure to attend and then a further refusal due to previous refusal and no change of circumstances...In each case the appellant telephones the DWP and the call handler then effectively determines which decision is appealed... Prior to MR as a Judge I would just admit a late appeal against all decisions and hear them together as the appellant intended. I can no longer do this. The appellant has to seek further MR which is likely to be refused as out of time. This is confusing for appellants and must leave them with a sense of injustice.

Tribunal Judge

We recommend the Departments ensures that the MR process captures and covers all aspects of a dispute to ensure appellants are able to appeal everything they wish to dispute.

Methods of requesting MR

At DWP, claimants are informed that MRs can be requested over the telephone or in writing. Experimental statistics released in December 2014 show the method by which all 177,000 MRs have been requested from October 2013-October 2014.⁵⁰



When excluding the 'unknown' category,⁵¹ 65 per cent of MRs were requested by telephone, with a further 26 per cent requested by letter. It is appropriate that DWP will accept a range of communication methods including e-mail and face-to-face, but this does not appear to be referred to in any DWP communications. This inconsistency between the means by which DWP will accept an MR and what it states is required should be corrected, advising customers about the full range of methods available to make a request.

We recommend that DWP should publicise the full range of methods by which a Mandatory Reconsideration can be requested.

At HMRC, MRs can only be requested by writing to HMRC or through the completion of form *WTC/AP*⁵². This is potentially problematic since:

⁵⁰ [Mandatory reconsiderations of DWP benefit decisions: data to October 2014 DWP.\(2014\)](#). These data exclude 100 MRs requested face-to-face, constituting 0.1% of all MRs.

⁵¹ These are MRs recorded where the method of request has not been recorded by DWP officials.

⁵² [What to do if you think your Child Tax Credit or Working Tax Credit is wrong, HMRC form](#)

- Claimants have different communication needs and preferences and HMRC should seek to cater for customers' requirements in line with DWP practice and in accordance with wider Public Sector Equality Duties.
- The inconsistency between the two departments has potential to create confusion and lead to request periods being missed.

Claimants may assume that the MR process would be the same in the two departments: what worked for requesting an MR for DWP would be assumed to work at HMRC. A telephone call to DWP seeking a review of the decision would be counted as an MR, but at HMRC it would not.

In order to avoid confusion, we recommend that HMRC and DWP should examine the feasibility of unifying their processes for requesting a Mandatory Reconsideration. This would include treating all requests to look at a decision again at HMRC to be treated as a Mandatory Reconsideration request.

We note this is a relatively short term issue given the plans for migration of Tax Credits to UC, however given that this will impact on a significant number of individuals in the interim period, (which could be several years), we believe it should still be considered. We note there is precedent for government aligning processes in legacy benefits to be as they will be in UC, for example the introduction of the Claimant Commitment in JSA.

Making requests by telephone at DWP

Stakeholders raised the issue that claimants sometimes experienced difficulties lodging a Mandatory Reconsideration by telephone.

Requiring the use of the term 'Mandatory Reconsideration': if the correct language has not been used by claimants, staff have sometimes organised for 'reviews' or otherwise handled the dispute in a way that does not progress appeal rights. A Memo issued in May 2015 from the Benefit Business Partner Team instructed staff to take a broad interpretation of requests for MR: *"If a customer advises us they disagree with a decision, want us to look at it again, ask for a review, ask to appeal etc. the request should be treated as a request for an MR..."*⁵³ but stakeholders told us this sometimes remained an issue.

⁵³ [Gatekeeper Memo 03.15.38, disclosed by FOI](#)

There are a number of claimants who request mandatory reconsiderations over the telephone who find that their request hasn't been treated as a request for a mandatory reconsideration.

Paddington Law Centre

Requiring the claimant to provide additional evidence for a MR to be carried out: Claimants should of course be encouraged to provide additional evidence if it would help their case but this is not a formal requirement.

DWP staff advising against having a MR or otherwise discouraging claimants from pursuing their appeal:

We have received several examples from local staff of people with Parkinson's who were actively discouraged from making mandatory reconsideration requests, or in some cases, refused altogether.

Parkinson's UK

One particular problem I have started hearing again and again is that people were told to phone the DWP helpline (and in some circumstances, the DWP now appear to be phoning claimants) and were told by helpline staff that there was no point in putting in an MR request because, without additional medical evidence, the decision would definitely not be overturned

Law for Life

The structure of the Jobcentre Enquiry Line (JEL) conversation when claimants call DWP: the instructions for operatives handling enquiries related to Decision-Making and Appeals potentially frustrates claimants' access to MR. If claimants call to dispute a decision on the phone, they are first to be offered a verbal explanation of the decision or, if refused and they remain unhappy, claimants are to be offered a 'written statement of reasons' that can take up to two weeks to arrive. If the claimant has already received a 'statement of reasons' or if they refuse one, only then is the operative to suggest that an MR can be conducted and the possibility of progressing to an appeal mentioned.⁵⁴

Furthermore, some stakeholders told us some operatives were not following this guidance properly. They reported that some claimants were being

⁵⁴[Operational Guidance for the Jobcentre Enquiry Line , FOI response \(July 2014\)](#)

required to have both an additional verbal and written explanation prior to being able to request an MR – creating a further step in the appeals process.

Summary

It is very difficult to establish how widespread these practices are, but **we recommend that DWP establish a process for identifying any incorrect practice and ensuring this is addressed.** If claimants are better informed of their rights and the appeals journey from the outset, it may encourage them to challenge any additional burdens being incorrectly placed upon them.

Supporting written requests

Claimants wishing to make a written request for an MR at DWP are provided with little guidance on how to do so, despite it potentially being advantageous for the claimant. It would be helpful if there were a standard form claimants could complete that gathers all information that would be needed for a decision to be reconsidered effectively. Completion of the form should not become a requirement, but could serve as a useful guide for those unsupported in the system. It also provides an opportunity to prompt claimants to send in relevant evidence from the outset with their request. **We recommend the introduction of a standard form, which could also be made available for claimants to submit digitally.**

Intermediate MR communications from HMRC

The Low Incomes Tax Reform Group told us of letters being sent to claimants following an MR request that told them they had not provided sufficient evidence to overturn their decision and that they could either (i) withdraw their MR request or (ii) continue and provide additional evidence and information. This incorrectly implies an MR could not continue without further evidence:

Although this particular version of the letter is a slight improvement on earlier versions which put pressure on claimants to withdraw their request for reconsideration, we are still concerned that it suggests to claimants that there are only two options and that if they don't have extra evidence they believe that they should withdraw. Clearly, there should be a third option of indicating the information you have provided is sufficient and you want HMRC to continue so that the case can continue the appeals process to the Tribunal"

Low Incomes Tax Reform Group

We were told by HMRC that these letters are sent out in order to encourage further evidence to be provided, and that if they were not responded to the MR would progress as planned however this is not clear.

We recommend that letters to gather evidence at HMRC make clear that further evidence is not required for an MR to progress.

Examining MR outcomes and process

Outcomes

There are limited data available on the overturn rates from MR at DWP relating to sanctions, ESA fitness for work decisions and Personal Independence Payment. There are no published statistics on outcomes at HMRC at this time.

The table below summarises sanctions data in JSA and ESA in the period Q1 2014 – Q4 2015.⁵⁵

JSA

	Q1 2014	Q2 2014	Q3 2014	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015
Adverse Decisions	225,149	183,346	161,689	140,469	112,340	81,208	67,319	63,941
Subject to MR	12,832 (6%)	14,419 (8%)	19,769 (12%)	9,482 (8%)	7,729 (7%)	5,045 (6%)	3,900 (6%)	3,067 (5%)
Decision Changed	3,811 (30%)	5,771 (40%)	6,164 (31%)	2,548 (27%)	994 (13%)	479 (9%)	511 (13%)	358 (12%)

ESA

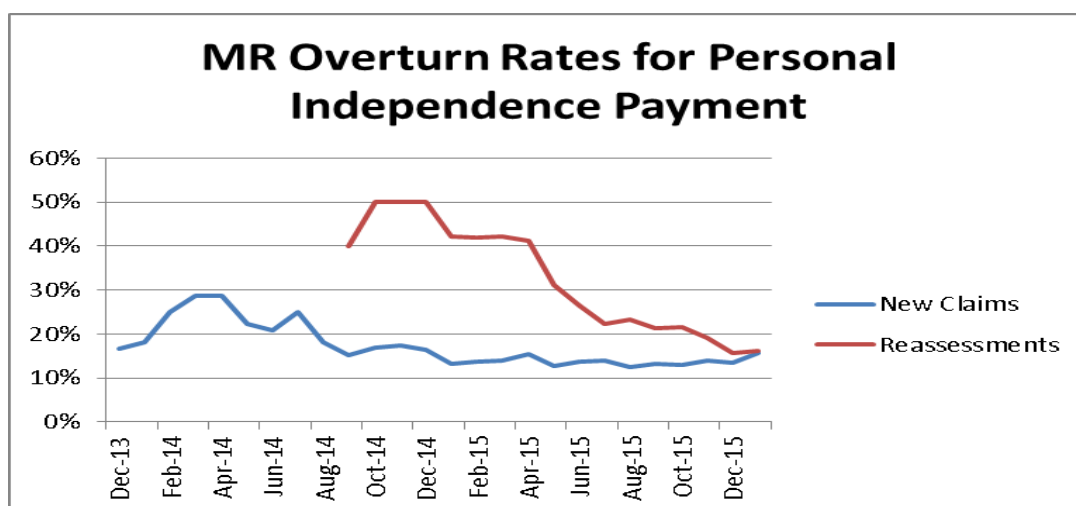
	Q1 2014	Q2 2014	Q3 2014	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015
Adverse Decisions	13,505	13,491	10,594	8,916	8,273	6,161	4,483	5,649
Subject to MR	256 (3%)	444 (3%)	620 (4%)	387 (4%)	290 (4%)	183 (3%)	96 (2%)	81 (1%)
Decision Changed	149 (75%)	335 (63%)	388 (63%)	228 (59%)	104 (36%)	75 (41%)	46 (48%)	29 (36%)

For both JSA and ESA, there has been a general trend towards a lower proportion of MR decisions resulting in a decision overturned over time and ESA sanction decisions have been more likely to be changed than those for JSA. We cannot compare these figures with those for previous internal review prior to appeal because the figures were recorded differently.

For PIP, MR overturn rates have been falling over time for both new claims and those moving from Incapacity Benefit (Reassessments). In January 2016 16 per cent of decisions were overturned at MR for both new claims and reassessments.⁵⁶

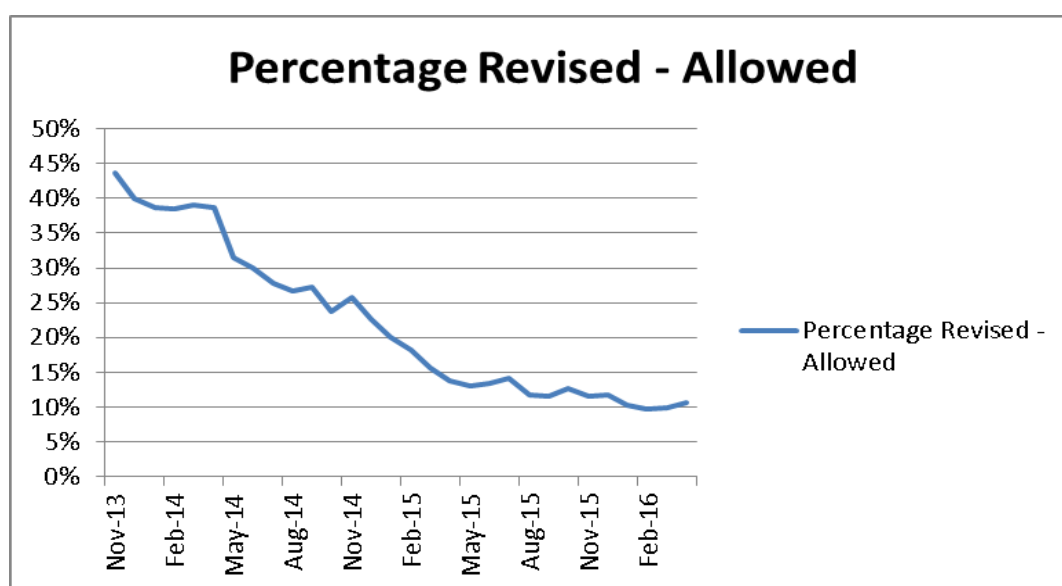
⁵⁵ Data from DWP Stat-Xplore. To note these numbers are in-month decisions, not cohort based and so the proportions are approximate.

⁵⁶ [Personal Independence Payment Statistics: April 2013 to January 2016, DWP \(2016\)](#)



In June 2016, DWP released its first statistics in relation to MR outcomes for ESA fitness for work decisions. These data show that over time, the proportion of decisions that are overturned at MR has been decreasing, reaching around 10 per cent by April 2016.

ESA fitness for work decisions overturn rate



The Department states that the fall over time is attributed to a ‘combination of low registrations’ in the beginning and ‘time needed for new operational practices to settle down’.

A breakdown has also been provided of overturn rates broken down by reason for MR and show substantial variation:

MR overturn rates for ESA fitness for work decisions by reason

	Disputing ESA Group (17% of all MRs)	Disputing Fitness for Work (69% of all MRs)	Disputing Failure to Attend WCA etc. (15% of all MRs)
No. Of Decisions Made	48,900	203,600	43,100
Success rate	46%	10%	29%

No data have been published on the outcome of MRs relating to any other benefits although the government has signalled to produce these. In a response to a PQ dated 12th October 2015, the Minister for Welfare Reform stated:⁵⁷

The Department has plans to look into what might be possible to publish on mandatory reconsiderations in the existing regular statistical publications, including information on outcomes. As each publication is ready, DWP statisticians will pre-announce the improvements in accordance with the UKSA release protocols.

**Minister for Welfare Reform
12 October 2015**

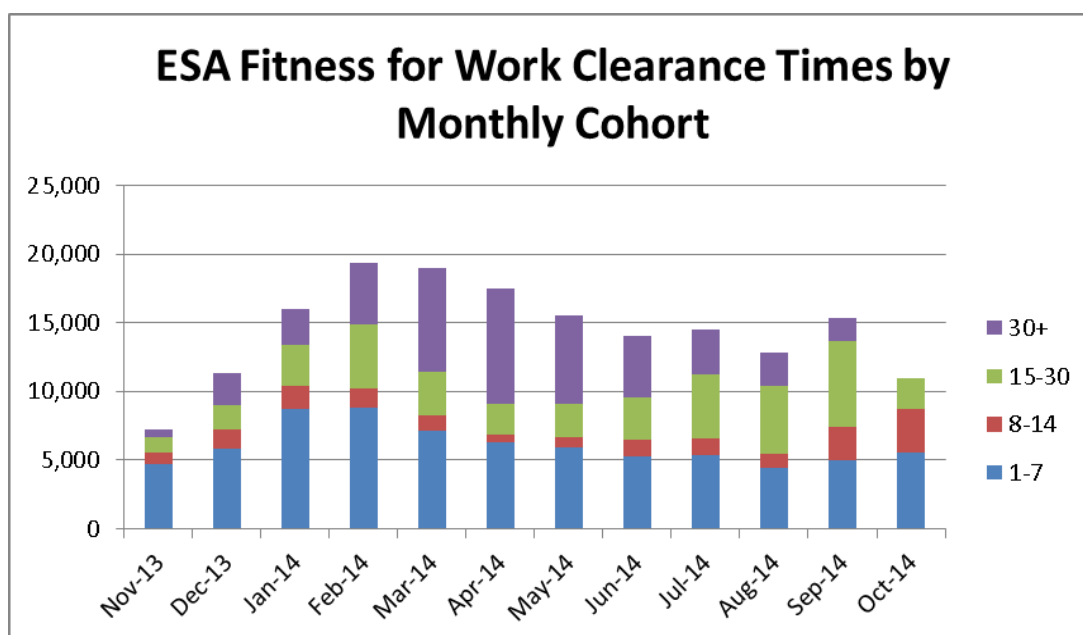
The Committee recognises that since this time the Government has produced statistics for MR on ESA fitness for work decisions, which we welcome. However, there are still no data available on many benefits. **We recommend that the government prioritise this work, setting out a clear timetable for the publication of outcomes data across the benefit system. This applies equally to HMRC where currently no published data are available on outcomes at all.**

Timeliness of MR and 'streamlining' of the process in ESA

The only statistics released by DWP on time scales have been waiting times for ESA fitness for work MRs between November 2013 and October 2014.⁵⁸

⁵⁷ [Written Question HL1957 to DWP responded to 12th October 2015](#)

⁵⁸ [Mandatory reconsiderations of DWP benefit decisions: data to October 2014, DWP, \(2014\)](#)



The data show the proportion of decisions taking 30 days or more began to fall from its peak of those making a request in April 2014. Although no further data have been published, the Minister for Welfare Reform told the Work and Pensions Committee in November 2015 that 95 per cent of ESA MRs in 2015 were being cleared within 10 days with the average clearance time at 5.3 days.⁵⁹ This suggests a considerable reduction in waiting times from the previously published data. We understand from DWP decision makers that the process had recently been streamlined. The previously routine phone call to claimants to gather additional evidence were no longer taking place, with DMs encouraged to make decisions on the basis of the evidence available. It seems the emphasis had shifted to ‘quantity’ of decisions at the expense of quality. We were told there has been a significant push to reduce waiting times for MR, and this could explain why stakeholders told us MR had been conducted ‘too early’ in some cases before additional evidence could be sent in.

I have had cases where a Mandatory reconsideration has been requested and the claimant has stated that they would provide further evidence on a point of the WCA decision. That mandatory reconsideration was taken and “reconsidered” the same afternoon and rejected. This is a pointless exercise and only adds cost to the process and no value

Advisor, YMCA Exeter

⁵⁹[Oral evidence: Benefit delivery, HC 372-ii. See Q204. \(2015\)](#)

There is thus a question as to whether too much emphasis has been placed on timeliness, which could be at odds with the original policy intent of introducing a thorough reconsideration of the decision. In other cases, stakeholders told us that some MR decisions continue to take a considerable amount of time and this should be monitored as well. The Minister for Welfare Reform has signalled that a target would be introduced⁶⁰ but this is yet to materialise.

We recommend the Department, informed by evidence from decision makers, give consideration to whether the recent ‘streamlining’ process allows for effective reconsideration and thereby strikes the right balance between quantity and quality of MR decisions whilst minimising undue delay.

There are currently no published data available on the processing times of Mandatory Reconsideration at HMRC.

For the purposes of transparency and better accountability, the Committee would encourage the government to publish more data on the waiting periods between requesting an MR and the issuing of an MR notice for the full range of benefits at DWP and HMRC.

Evidence gathering phone calls for ESA

Prior to the streamlining referred to above, claimants were called and asked if they had any additional evidence to provide. If a mobile number had been provided, the claimant would be sent a text notifying them to expect a phone call and when.

Two main issues were raised with respect to these phone calls by stakeholders:

1. Phone calls were noted by stakeholders to be overly scripted and making generic requests for further evidence. There appears to be scope for a more bespoke approach whereby evidence gaps or anomalies could be actively identified by the DMs who better understand the descriptors and/or the basis of entitlement than the claimant.
2. Phone calls to the claimants themselves, as opposed to their representatives, may not be the best way to gather information. Some claimants may lack the capacity to respond effectively or be unable to engage usefully in a telephone conversation when ‘put on the spot’.

⁶⁰ [Oral evidence: Benefit delivery, HC 372ii – See Q205 \(2015\)](#)

The evidence before tribunals suggests that DWP ask if the claimant has any further evidence without saying what would be helpful. DWP could take the opportunity to ask relevant questions to establish further evidence about the functional needs of the claimant.

Tribunal Judge

We...also had issues with the phone calls made by Decision Makers to vulnerable Service Users. These are often inappropriate for those with little capacity or understanding of complex benefit rules; and discourage the client from taking (their case) any further

Gipton Independent Living

Consideration of evidence by DMs

Stakeholders were concerned that evidence provided was in many cases not being considered, since there would be no reference to the evidence at all in subsequent communications. It could therefore be unclear to claimants and/or their advisors whether the evidence had arrived and/or been considered in making the decision.

Another reoccurring issue is that decisions made do not seem to take account of medical evidence provided. We therefore put to the DWP that if medical evidence is provided with the application that as part of the decision making process, a reference is made to the medical evidence so that it is clear that it has been considered. This would help manage the expectations of clients when they apply for either ESA or PIP and the advice sector would have a clearer understanding of how evidence is used.

Advice Nottingham

It is of utmost importance that Mandatory Reconsideration Notices (MRNs) make reference to all evidence received and taken into account in making decisions. They should also include reasons why evidence provided is ignored or discounted where applicable. At present claimants have no way of knowing whether or not evidence submitted has been received. Making these changes would help claimants to understand the decision and provide appropriate reassurance that their evidence has been both received and considered.

If welfare rights advisers do not believe evidence submitted is being used, there is a risk they will advise claimants not to take the effort to send it to DWP, which undermines the entire reconsideration process.

It says much about this systemic failure (to consider new evidence) that many representatives will simply provide the evidence to a tribunal rather than a DM because they do not wish to waste time or other resources. This then further fuels the misguided DM and DWP idea that claimants present evidence at too late a stage when part of the reality is that they would refuse to deal with it once an appeal has been lodged even if it were to be presented to them.

Salford Welfare Rights and Debt Advice Service

Other issues with Mandatory Reconsideration Notices (MRNs)

Once a decision has been reconsidered, an MRN is issued that should contain the decision taken, the reasons for that decision, the evidence this is based upon and the legislation applied. In addition it contains information on appeal rights should the claimant still disagree with the decision. An MRN is required to lodge an appeal with HMCTS.

A number of issues have arisen with the use of MRNs at DWP:

1. Not all MRNs are clearly labelled as such, resulting in confusion for both claimants wishing to further their dispute and those working in the direct lodgement centre at HMCTS, who are tasked with establishing whether a mandatory reconsideration has taken place.
2. The decision itself and its consequences have not been expressed in plain English in a way the claimant can be expected to understand. For instance, a letter that states *“I have determined you have limited capability for work but not limited capability for work related activity”* will not be readily understood by many people.
3. Any reference to a right of appeal is usually placed at the back of what can be quite a long letter, *after* the decision maker’s signature. Stakeholders reported that claimants have believed incorrectly that their MR was their appeal or that they had reached the end of the dispute resolution process.
4. Explanations of decisions can be unclear, written in long continuous prose that does not allow the information to be easily broken down. This is particularly problematic when the decision is complex and includes a number of aspects such as in ESA. A better approach may be to use a table with a row for each contested descriptor with each possible outcome, an example is shown overleaf

Contested Descriptor	Evidence Used	Result
(e.g.) Manual Dexterity	You stated you could not pick up small objects in your ESA50 form. However at the Assessment you had no difficulties writing which requires you to hold a pen.	(d) None of the descriptors apply – 0 Points Awarded

As an annex, each contested descriptor and the possible outcomes should be included for the claimant’s benefit. This will assist claimants in following the process that has been applied and understand the decision made in their case.

We therefore recommend that:

- **all MRNs are clearly labelled as such to eliminate confusion on behalf of the claimant and HMCTS;**
- **the implications of the decision for the claimant are briefly summarised in plain English;**
- **there is signposting to onward appeal rights on the first page of the letter; and**
- **in order to break down the reasoning of a complex decision such as one for ESA, a table with a row for each contested descriptor may help the claimant understand the decision.**

The role of Concentrix at HMRC

In April 2014, HMRC awarded a contract to Synnex-Concentrix UK in order to increase capacity to carry out compliance checks on Tax Credits awards. They began operation in November 2014. The contract uses a “payment by results model”⁶¹ and has been valued at between £55m-£75m.⁶²

This contract is a major departure for HMRC as decisions about a claimant’s past eligibility to a benefit are being made by a commercial organisation acting under delegated authority. This same organisation is then performing mandatory reconsiderations when a claimant challenges the initial decision.

⁶¹ [Welfare Tax credits:Written question - 20454](#)

⁶² [Concentrix:Written question - 21505](#)

The details of the payment model used in this contract are not in the public domain due to 'commercial sensitivity', however payment by results implies the greater number of 'corrections' to claims Concentrix makes the higher its revenue will be. When claimants disagree with a decision and request an MR, it could be argued there is an incentive for Concentrix staff not to overturn decisions given it would impact negatively on their revenue. Put another way, the profit motive could reduce the ability of the contracted out organisation and its staff to be impartial when reconsidering decisions. It should be noted that if a decision does progress to appeal and is subsequently overturned, Concentrix will not receive payment but for reasons outlined earlier in the report claimants may not always progress their cases.

According to a recent PQ,⁶³ HMRC do not have the information readily available as to the number of Concentrix decisions that are overturned at appeal and that those figures 'can only be obtained at disproportionate costs'. It cannot therefore incorporate such information into its understanding of performance. Similarly, it does not appear that HMRC has published any data on the proportion of Concentrix MRs that uphold the original decision or how this compares to HMRC's own decisions. As of January 2016 it was estimated that mandatory reconsideration decisions were taking on average just under 5 weeks from the point of starting a review by Concentrix and the delivery of a decision. We are not aware whether this is better or worse than within mainstream HMRC where there are also no published data.

We recommend that the National Audit Office (NAO) should examine the Concentrix contract to ensure that at the same time as providing value for money, it has appropriate safeguards to preserve justice for the claimant.

Claimants disputing an ESA decision and awaiting a MRN

Issues with making a claim

Under the previous system, if a claimant was found fit for work and they disagreed with the decision; they had an immediate right of appeal. Once appeal forms were sent to DWP, the claimant would return to receiving the *assessment rate* of ESA until the outcome of their appeal was known. Under the new system, assessment rate benefit is not payable until a Mandatory Reconsideration has been carried out, and the appeal subsequently lodged with HMCTS.

⁶³ [Welfare Tax credits:Written question - 17279](#)

In the interim period, claimants are advised to make a claim for Jobseeker's Allowance which is currently paid at the same amount as the ESA assessment rate.

A number of issues have arisen with this policy:

Claimants feel a successful claim to JSA might prejudice the outcome of the disputed ESA decision

Claimants are in the process of disputing whether they are fit for work. Understandably, they may feel that if they make a claim for JSA which requires a declaration that they are fit and available for work, they will lessen their chances of being successful at reconsideration, or further down the line at appeal. There would be a reluctance to take any action that might harm their case for the benefit they are in the process of disputing they are entitled to.

Claimants may perceive a claim for JSA to be fraudulent

Making a claim for JSA or UC requires a 'claimant commitment' to be signed that requires them to state that they are ready and able to undertake work, a decision they are disputing. In the eyes of the claimant, the government is advising them to make a statement that they believe to be false in order to have an income whilst advancing their appeal.

Claimants do not perceive conditionality will be adequately flexed

Some claimants feel they will be unable to cope with the conditionality that will be applied to them under JSA. Even though Claimant Commitments should always reflect an individual's needs and requirements – there is a perception that this is not always applied consistently and claimants will be 'set up to fail'. Many welfare rights organisations share this view and they may discourage clients from applying as a result. There are other instances where the conditions placed on these claimants have been impossible to fulfil due to health problems which lead to risk of sanction.

Miss R from Islington decided to claim JSA whilst waiting for the ESA MR to come through. We advised she obtain a fit note to say that she couldn't travel more than 30 minutes by public transport because of continence problems. The Job Centre Adviser told her that if she couldn't travel for 90 minutes then she didn't meet labour market conditions. In this situation she was fortunate because a complaint to the Manager resolved this, but in other instances that may not have been the case “

Peabody Trust

Claimants can be ‘too well for ESA, too sick for JSA’

Stakeholders told us of cases where claimants who have attempted to make a claim to JSA in the interim period have been turned down by Jobcentre Plus because it is clear to the work coach that they are too unwell to find work. This could arise in cases where the claimant’s condition has deteriorated or is fluctuating or the decision was not made on the full facts. Where a claimant has been determined fit for work due to non-attendance at a Work Capability Assessment, JSA may be particularly unsuitable. Claimants then fall through a gap in provision between the two benefits:

There have been cases when the advocate provides support to apply for JSA but the Jobcentre staff has seen the disabled person is not well enough to work at the interview and told them to apply for ESA. The disabled person is in Catch 22 situation - meanwhile they have no income

Inclusion London

For the reasons outlined above, claimants may not feel claiming JSA is viable whilst awaiting their MR, leaving them without any financial support in the interim.

Furthermore, the policy is not conducive to evidence gathering by the claimant for two reasons:

1. In order to reduce the period of non-payment, there is an incentive to request a MR as quickly as possible to speed up the repayment process. This is at odds with the claimant taking the time necessary to seek out the relevant advice, provide high quality evidence and explanation of why they disagree with the Department’s decision.
2. Without income, claimants may not have the money required to facilitate evidence gathering: travelling to appointments, paying for phone calls or for relevant paperwork/documentation.

Claimants may also lose access to benefits and advantages contingent on entitlement to out-of-work benefits, for example Housing Benefit and Council Tax Reduction. They may not realise this has happened until arrears have built up resulting in hardship.

The government's previous response

Previously the Work and Pensions Committee had recommended⁶⁴ that the Government re-instate payment of ESA assessment rate throughout the appeals journey, but the Government did not accept that recommendation, writing in their response:⁶⁵

The Department acknowledges that some claimants may be reluctant to claim JSA after being found fit for work. The Department has made a number of improvements to its processes to make the transition to JSA work more smoothly. When claimants are found fit for work, unless the decision is overturned, that decision is in law a final decision and there is no legal basis on which to continue to make any ESA payments

**Government Response to the Work and Pensions Select Committee
Report on ESA and the Work Capability Assessment**

The Department told us of the following changes in process:

- Issuing new guidance for Jobcentre staff for those claimants making a transition from ESA to JSA – however it should be noted this guidance is not specific to those appealing, but only those moving to ESA for whatever reason.
- Enabling the routine sharing of Healthcare Professional reports with DWP to help with appropriate flexing of conditionality.

However, stakeholders told us the issues above persist.

Returning to ESA assessment rate post-MRN

A number of stakeholders told us that claimants were not always informed by Jobcentre Plus that they were able to move back to ESA following their MRN being issued, despite their entitlement being restored. In cases where claimants have done so, there have reportedly been delays of several weeks in the reinstatement of payment and this caused hardship.

⁶⁴ [First Report of Session 2014-15, Employment and Support Allowance and Work Capability Assessments, Work and Pensions Committee \(2014\)](#)

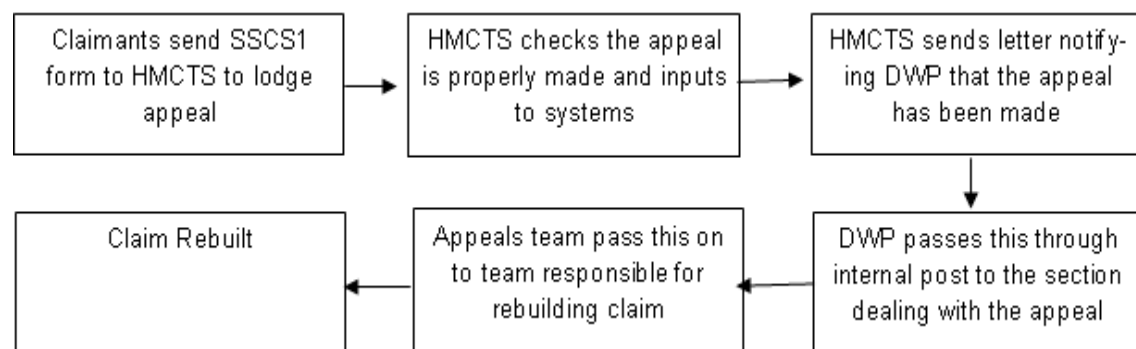
⁶⁵ [Government Response to the House of Commons Work and Pensions Select Committee's Report on Employment and Support Allowance and Work Capability Assessment, First Report of Session 2014–15 \(November 2014\)](#)

The All-Party Parliamentary Group on Hunger received the following reports last year:

- *The Trussell Trust stated that '[emergency food parcel] recipients switching between [ESA and JSA] were the most often cited benefits with issues of delivery. Recipients switching between the two benefits were frequently left without income due to delays and errors with the average wait time of 4.4 weeks whilst in some cases claimants were waiting for as long as 10-20 [weeks]'.*
- *Clay Cross Food Bank noted that 'mostly it is benefits relating to JSA and ESA. In some cases clients are assessed fit for work and benefits are stopped and a new claim made. In that delay – a minimum of three weeks – clients are referred to us. It is not uncommon for clients to appeal and are swapped back onto ESA, causing yet another delay and requiring feeding.'*

Feeding Britain

This arises because after an appeal is made with HMCTS, a number of steps are undertaken before the section of DWP responsible for 'rebuilding' the ESA award is aware that an appeal has been lodged. The process is outlined below:



HMCTS confirmed to the Child Poverty Action Group that if reference was made to financial hardship on the SSCS1 form or appeal letter, the compliance team at the Dispute Resolution Centre would flag this up and streamline the process by e-mailing a copy of the acknowledgement letter directly to the relevant DWP office, speeding up the reinstatement of payment⁶⁶. Although this may not be possible in all cases, the process as it stands does seem to have more steps in than is necessary and there is potential for it to be streamlined.

⁶⁶[Mandatory Reconsideration: Problems and Solutions. Child Poverty Action Group. \(August 2014\)](#)

The impact of Universal Credit

We recognise that many of the issues outlined here should be eliminated under UC, where there will be no requirement to sign on to a different benefit throughout reconsideration. The transfer should be seamless and without delay in payment, although conditionality will continue to be adjusted throughout the reconsideration period.

Recommendations

Having considered the available evidence the Committee make the following recommendations:

That DWP provide better information and advice for the claimant in this situation, in particular around:

- **Their eligibility for JSA**
- **Reassurances it will not count against their appeal**
- **Reassurance that any job search requirements are subject to reasonable adjustments given a claimants health problems.**
- **When a time target has been introduced, information around how long reconsideration is expected to take and their subsequent eligibility for ESA assessment rate thereafter.**

We recommend that DWP should consider ways to streamline the process whereby assessment rate payment for ESA is reinstated following the issue of Mandatory Reconsideration Notices

Where work coaches believe that an individual is too ill to search for work, there could be wider usage of the existing JSA sickness provisions.

4. Improving decision making standards

Training, guidance and organisational learning

We consider here the sources of information and support open to ESA DMs and Tax Credit caseworkers to help them carry out their role effectively, as well as the role of 'feedback loops' and opportunities for continuous improvement.

Initial training

DWP told us that training depended on an individual's background, knowledge and experience with discussion taking place between the Learning Delivery Officer, the learner and the line manager to identify needs. Learning is administered through a blend of facilitator lead and 'open' self-lead learning, with the majority being desk-based.

For ESA Decision Makers there are additional 3.5 - 4 days with four specific modules covering:

- Good Cause
- Gathering and Using Evidence
- Limited Capability for Work Assessment
- Work Capability Assessment Descriptors

The training is designed to place the DM in a position to make a decision, with the line manager then providing further support on the job.

There are three optional modules of training with specific relevance to mental health and vulnerable customers:

- Introduction to Working with customers with a Mental Health Condition
- Mental Health Conditions for Telephony Staff
- Introduction to working with Vulnerable Customers

These are part of a programme of learning aimed at new entrants to the Department and are not specific to decision makers. Given that around 50 per cent of the ESA caseload has a mental health condition,⁶⁷ it could be argued that all ESA DMs should receive training on working with those with a mental health condition. We were however told that there was specific reference to vulnerable claimants and those with mental health issues throughout all the modules.

DMs told us that training for new staff was much improved and more structured than they had experienced previously, but that it was not

⁶⁷[Data obtained from DWP Tab Tool for ESA](#)

comprehensive. Learning ‘on the job’ was an important aspect of training and assigning more senior DMs as mentors was felt to be useful, although carried a danger that inconsistent practices might be carried forward.

At HMRC, senior managers told us training for Tax Credit caseworkers consisted of:

- Two weeks of general computer-based induction, taking place in a dedicated part of the building, the ‘Learning Academy’
- On-going one-on-one training with more experienced Caseworkers acting as mentors.

Speaking to newly recruited caseworkers, some felt training had been quite general and did not prepare them for some of the specifics of their role. They felt they had not received enough training on decision making generally, for example on the need to weigh up evidence. This view was also held by staff working on MR that much of what was covered was not directly relevant to the tasks at hand. Learning on the job was felt to be critically important as was the role of mentoring.

We recommend that all training should be reviewed for relevance and to ensure it is fit for purpose in carrying out the work of a DM/caseworker, building on previous improvements and working closely with staff to understand their needs.

Written guidance

There are numerous sources of written guidance available to staff: the *standard operating procedures* at HMRC and *operational instructions* at DWP were considered to be most useful on a day-to-day basis. More detailed, technical guidance is available through the Decision Makers’ Guide (DMG)⁶⁸ and Advice for Decision Making (ADM) at DWP and the Tax Credit Manual⁶⁹ at HMRC through the intranet providing detailed information in more nuanced situations.

At DWP, DMs noted this guidance was accurate and reliable but was difficult to navigate. They told us the search facility is unreliable, and that it was sometimes difficult to know where in the guidance they should look for a particular issue or what their search term should be. Links were sometimes broken and the location of pages changed. This is time consuming and so DMs can be reluctant to consult the guidance regularly, preferring to ask more experienced colleagues for advice. This creates the risk of inconsistency in decision-making. At HMRC, similar issues were raised with respect to being

⁶⁸ [Decision Makers Guide, DWP \(2016\)](#)

⁶⁹ [Tax Credit Manual, HMRC \(2016\)](#)

unable to find specific answers and thus preferring to ask a colleague over using the guidance.

We recommend at both DWP and HMRC that guidance needs to become easier to navigate, with an improved search function and an index - with specific training on the effective use of technical guidance.

Other sources of support

Telephone access to healthcare professionals

Decision Makers are able to call a 'hotline' to a Healthcare Professional (HCP) to seek advice around interpretation of evidence or healthcare reports.

However, DWP staff told us it could be difficult to 'get through' and that HCPs based in other areas to the DM were sometimes unwilling to provide help despite being available to do so.

We recommend DWP reviews the issue of access to Healthcare Professionals for DMs.

'Guidance queries' to head office

At DWP, DMs are able to escalate queries to a centralised team based in Leeds. This now requires line manager approval and to show that the relevant sections of the guidance have first been consulted. This is to ration expertise available at the corporate centre. DMs said this was a useful service but that not all answers provided clarity – it was suggested it would be helpful if all previous questions and answers were published on the intranet as to avoid making queries that had already been answered.

We recommend responses to Guidance Queries are accessible in a searchable database.

Decision Maker discussion group

Previously DWP staff had a virtual 'discussion group', an online forum where DMs could place queries and colleagues across the country could respond. This was thought to be useful and a rich source of information and advice. It had been replaced with another system, 'Collaborate', but it is far less frequently used by DMs and so less helpful. **We recommend the**

Department seeks to understand why 'Collaborate' is not being used by some DMs and considers ways it can actively encourage online collaboration and sharing of expertise and best practice.

Feedback loops

We consider here ways in which Decision Makers and the Departments can better understand their own performance and thereby continuously improve:

Quality Assurance Framework

Both DWP and HMRC have a process where a random selection of decisions made by DMs is assessed for 'quality' by other more experienced DMs. They are to consider: whether the law has been correctly applied, if the decision was legally defensible and whether the decision was communicated adequately. The outcomes of this exercise are then communicated to staff when reviewing performance. This was thought to be a helpful learning tool by DWP DMs. At HMRC there was a sense from first-tier decision makers that 'quality' was more about whether processes were followed than if decisions were necessarily 'high quality'. There is also an issue about whether decisions determined to be 'quality' are subsequently overturned at tribunal then it raises questions about the usefulness of the framework.

We recommend a review of the Quality Assurance Framework used by DWP and HMRC to establish if it is fit for purpose in evaluating whether decisions are of a high quality.

Feedback to First-Tier DMs from those conducting MR

At DWP, when decisions are overturned at the Mandatory Reconsideration stage, the reasons for this are recorded on a database referred to as QUEST (Quality Every Single Time). This information can then be accessed by the original Decision Maker. Usage varied amongst DMs we spoke to, who noted in many cases that decisions were overturned because new information was provided by the claimant. If they disagreed with one another, which they often did, there was felt to be limited opportunity to enter into a dialogue with the DM conducting the MR. At HMRC, this feedback loop was applied inconsistently, with some Caseworkers telling us they had never had feedback from colleagues conducting MR.

Use of tribunal feedback

Where decisions made by DWP are overturned at tribunal, there appears to be scope for the Department to 'learn' from previous mistakes and the tribunal process overall.

Currently, DWP presents a relatively small proportion of first-tier tribunals.⁷⁰

⁷⁰ [Response to PQ 31496 to DWP, responded 22nd March 2016](#)

Proportion of Tribunals with DWP Presenting Officers Present

Financial Year	Tribunals with Presenting Officer Attending	Total Number of Tribunals	Percentage Attendance
2012/13	14,782	252,992	6%
2013/14	14,789	308,502	5%
2014/15	11,388	89,689	13%

Given the importance of ‘cogent oral evidence’ in overturning decisions, we would suggest DWP officials could gain greater understanding of the inquisitorial approach taken by tribunals – identifying reoccurring themes that could help inform both:

- (i) Training of DMs to obtain relevant information from claimants through telephone calls.
- (ii) The design of claim forms to better anticipate the information requirements of decision-makers.

This could involve staff ‘observing’ tribunals without necessarily presenting at them which is more resource intensive.

In 2012, an agreement was made with HMCTS that judges would provide ‘summary reasons’ for overturning DWP decisions, with judges selecting options from a drop-down menu such as ‘cogent oral evidence’ or ‘new evidence supplied’. Early results from this pilot were discussed on pages 14-15 of this report. After the pilot it was agreed that free text would be more useful as it would allow judges to articulate more precisely their reasoning and so better enable DWP to understand why decisions were overturned. Reasons given by the tribunal have lacked detail, despite requests from the Department for more information to be provided.

Solutions to this could involve:

- A request that judges only provide feedback in cases where the decision has gone particularly wrong but to do so in greater detail in these cases – this might be measured, for example, by the disparity in the number of points awarded by the DM and that of the tribunal in fitness for work decision.
- To send more DWP staff to observe tribunals first hand to collect their own data, recording the detail they feel is most relevant.

Despite some issues with quality, DWP policy officials analyse the data available to inform the annual report it makes to the President of the Social Entitlement Chamber, who has overall responsibility for all social security

tribunals, on behalf of the Secretary of State. This report outlines lessons learned in the previous year from the feedback and improvements implemented as a result. Unfortunately, this is not currently in the public domain.

We recommend that this report is published to improve understanding of how feedback is being used and what improvements are implemented as a result.

Beyond this, however, tribunal feedback plays a limited role in the development of individual DMs. Speaking to DMs conducting MRs, they were not routinely notified if their decisions were overturned and there was no way for them to find out the reasons why. There is currently no understanding of performance in relation to tribunal outcomes and this finding was mirrored at HMRC.

We recommend that decision makers at DWP and HMRC are made aware of when their decisions are overturned at tribunal (and the reasons for this) to help identify where things could be done differently.

The case for independent oversight of decision making

As we noted on page 11, there is no independent oversight of the DM process and very little by way of external scrutiny beyond the backstop of tribunals. In particular, the following may benefit from external review from time to time:

- The impact of policy and process changes on decision making and access to justice – in particular whether policy is being implemented as intended ‘on the ground’;
- The accuracy of initial decisions, including cases which find claimants to not be entitled;
- Ensuring the Department maximises opportunities for organisational learning and produces guidance and training that is fit for purpose and meets the changing requirements of welfare reform.

We recommend that the Government consider aspects of the decision making process that could benefit from external oversight and how best this can be carried out.

We proceed by considering arguably the most important aspect of the decision maker’s job: the use of evidence.

The role of evidence

Guidance on the use of evidence at DWP

As with all statutory authorities, DMs, working on behalf of the Secretary of State, must make all decisions on the basis of evidence.⁷¹

Burden of proof and the balance of probabilities

In making a claim, the claimant initially has the *burden of proof*, that is, the claimant has a responsibility to prove their eligibility, as opposed to the Department being required to prove the claimant is not eligible. Despite this, there is a responsibility, written into the Decision Makers' Guidance, that DMs should '*do as much as possible to see that all necessary evidence is brought to light*' - reflecting the fact that eligibility can be complex and the claimant, particularly if unsupported, may not be as well placed to understand what evidence is required as the official would. At the same time, the burden is on the claimant to supply the information and evidence that the DM asks for.⁷² DMs are tasked with weighing up the evidence and making decisions on the basis of the *balance of probabilities*, the same standard of proof that is applied in UK civil courts. This means the DM is required only to establish whether the assertions are "more likely than not" to be correct.

Different types of evidence

Evidence can take many forms, as identified in the Decision Makers' Guide:

Direct – For example, a statement by a witness to an industrial accident

Indirect – For example, a statement by someone who did not see the accident but saw the victim immediately afterwards and saw the injuries and circumstances which probably caused them

Hearsay – for example, a statement by someone recording what they were told about an accident.

Each type of evidence may be either:

Documentary – for example, certificates or wage slips

Oral – For example, a statement given verbally (e.g. a telephone call)

Something tangible - for example, a wage packet with money in it.

⁷¹ [Decision Makers Guide 01310, DWP \(2016\)](#)

⁷² [Decision Makers Guide 01345, DWP \(2016\)](#)

The DMG states that, “*The DM can use all three types of evidence. Some carry more weight than others. The weight given should be carefully judged in the circumstances of the particular case. As a general rule, direct evidence is seen as more significant than indirect or hearsay evidence*”. Also, “*the closer in time to the event the DM obtains and considers the evidence, the more helpful it is likely to be*”. It further states that “*Documentary evidence carries the most weight and is preferred*”.⁷³

Issues arising in the gathering and use of evidence by DWP for ESA

A number of issues have arisen with the collection and use of evidence in Departmental decision making.

Use of Healthcare Professional reports

Stakeholders told us of many instances where HCP reports have failed to capture important aspects of the claimant’s condition, resulting in incorrect decisions being made by the DM. Subsequently at tribunal claimants have been awarded substantially more points than previously recommended by the HCP report. It was felt that too much weight was placed on the reports:

We consider HCP reports continue to be generally of poor quality and the DWP’s over reliance on them is a key reason why outcomes are so poor at the MR stage compared with the appeal stage. We consider the DWP habitually fail to give proper weight to evidence from other sources and that a culture change with respect to their approach to weighing up of evidence at the MR stage needs to happen, with a more even handed and less HCP focused approach adopted

Money Matters Advice Service, South Lancashire Council

Given the importance placed on this evidence in determining eligibility for ESA, it is essential that these reports reflect claimant’s circumstances accurately.

Previously, ATOS were contracted to provide these assessments in ESA, but due to concerns around performance, this was transferred to Maximus in March 2015. Both companies are/were required to carry out an ‘audit’ on the quality of their reports against contractual standards, the results of which were published in January 2016 by the National Audit Office (NAO).⁷⁴

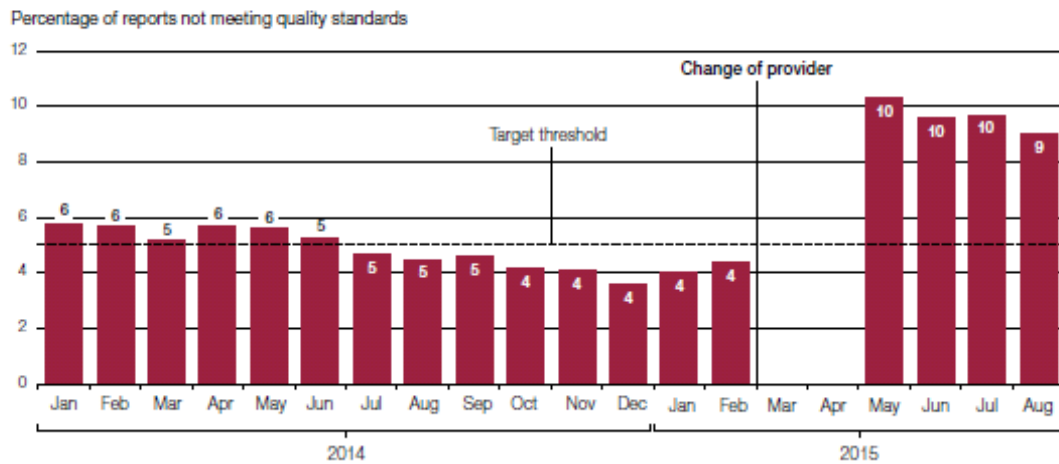
⁷³ [Decision Makers Guide 01320, DWP \(2016\)](#)

⁷⁴ [Contracted out Health and disability assessments: NAO Report by the Comptroller and Auditor General, National Audit Office \(2016\)](#)

Figure 5 continued

ESA and PIP assessment report quality: proportion of assessment reports below expected quality standards between January 2014 to August 2015

ESA providers



It is worth noting that the large increase observed with the change of provider may not represent a decline in quality, but a result of different audit arrangements that were introduced when the new contract began.⁷⁵ Nevertheless the proportion of reports failing to meet quality standards remains too high by Maximus's own measure. Whilst concerns persist, DMs must be vigilant around their interpretation of reports and their recommendations. Stakeholders told us that DMs fail to explore contradictions that arise between the HCP report and other evidence provided by the claimant.

No attempt is made to clarify what appear to be inconsistencies between what is claimed, the observations, treatment provided and assessment.

Tribunal Judge

Claimants do not typically have sight of the HCP report until reaching the tribunal, where it is usually included with the appeals pack. This is problematic given that it is often central to the DM's reasoning for a decision. Although it may be obtained on request, stakeholders told us that claimants do not often realise this. If claimants had access to the HCP report earlier in the process, they would be able to see for themselves the evidence on which the DM has based their decision. This would allow them to better understand the decision and help inform what evidence they may need to provide to bring about the

⁷⁵ These include: having a single, dedicated, independent audit team: how assessment reports are selected for testing and when selected reports will drop out of the sample.

change in decision. This potentially saves time for all involved and facilitates evidence to be provided earlier and thereby avoid the need for a tribunal.

We recommend that DWP should provide a copy of the Healthcare Professional Report with all decisions made about the claimant so they can understand the basis on which the decision was made.

DMs should actively explore contradictions between reports and other evidence provided.

Difficulty acquiring evidence from medical professionals

There have been cases of claimants seeking specific medical evidence from their General Practitioner (GP) who have been refused or required to pay a fee. Citizens Advice research involving 173 GP practices across England and Wales found that:⁷⁶

- 15 per cent of GPs did not provide medical evidence directly to patients upon request
- 50 per cent of practices charged on all occasions, with a further 24 per cent charging some groups but not others
- Of those that charged, 19 per cent charged £10 or under, with 61 per cent reported charging between £10.01 and £50. The most charged by any practice was £125.

When GPs were asked why they charged a fee, doctors said it was a significant time burden for staff (both secretarial and medical) and the fee reflected the time required doing what is otherwise an unfunded activity, amounting to “private work”. They had in some instances already completed other ESA paperwork free of charge and did not see the point of providing what they see as the same information again.

Practices charged differing amounts depending on: the ability of patients to pay, how much time the request would take to carry out and the amount of office resources required in making the request. Attitudes varied significantly across the country, with only 24 per cent of surgeries surveyed having an agreed, written policy on the provision of medical evidence to patients as part of the ESA WCA process.

It is worth noting that if DWP, the HCP or the Tribunal request this evidence it will be provided for free as part of the GP’s terms of service.

⁷⁶ [GP attitudes and practices relating to the provision of medical evidence as part of the Employment and Support Allowance \(ESA\) claim process. Citizens Advice \(2014\).](#)

Participation was voluntary, between 20-50% of those targeted in each area responded.

When we spoke to DMs, they told us they believed much of the evidence provided by doctors was not relevant as it rarely related directly to the descriptors that form the basis of entitlement. More broadly there was felt to be a lack of understanding of the benefit system by GPs.

We recommend that DWP work with the Department of Health and the devolved administrations to establish a consistent approach to the provision of medical evidence.

Furthermore, DWP should seek to further raise awareness with the medical profession about how the benefit system functions and their role within it, and seek to design better forms to capture precisely the data required from doctors to determine claimant eligibility.

Responsibility for gathering evidence

Stakeholders told us that claimants were often not sure who had the responsibility to gather evidence. The ESA50 form collects the details of the claimant's GP which creates the impression in some claimant's minds that DWP will contact the doctor if required, which is not usual practice and this should be clarified. DMs are advised in the guidance that they must do 'everything they can' so that relevant evidence can come to light, but also that the responsibility of supplying evidence is down to the claimant. This onus of responsibility is not always clear, especially as there are cases where DMs have actually obtained evidence on the claimant's behalf. This inconsistency leads to confusion and DWP should seek to clarify what claimant's responsibilities are and the situations whereby the DM would seek evidence on the claimant's behalf.

There is sometimes confusion around who is responsible for gathering additional evidence, whether it is the responsibility of the DWP, the assessment provider or the claimant

Citizens Advice Scotland

We recommend that DWP should clarify for claimants under what circumstances it will gather evidence for claimants and what expectations are placed upon them at each stage in the decision making process.

Utilising evidence already collected by other bodies

It was felt by some stakeholders that some evidence that would already have been collected by other government agencies should be sought and utilised when making decisions. For example, they believed that certain attributes,

such as a claimant having a community psychiatric nurse, should trigger further evidence gathering efforts as standard.

Many of my clients also have care and support needs and have undergone a needs assessment with their local authority. The new assessments under the Care Act in particular, identify the needs a client has in a number of areas also considered in the assessment for ESA and PIP. This could be a useful source of evidence for a DWP decision maker.

Welfare Benefit and Care Advisor, Personal Financial Planning Ltd

If there is an Occupational Therapist or Community Psychiatric Nurse (CPN) allocated to a claimant it is an indication that the claimant has particular problems. It should be a prompt to get a report from them if the decision maker is considering refusing the claim

Tribunal Judge

Access to medical expertise to understand evidence

As discussed above, telephone access to Healthcare Professionals is reported to be patchy, and this must be addressed. Previously, Healthcare Professionals had undertaken 'site visits' to benefit centres to engage in what were considered to be positive discussions with DMs working on ESA claims. They were seen as important for 'improving the knowledge of DMs about how particular impairments or conditions might affect claimants'.⁷⁷ More direct contact between HCPs and DMs could help facilitate knowledge and understanding of medical conditions and support the correct interpretation of medical evidence. In Northern Ireland there are HCP 'site visits' to benefit delivery centres that were felt to be beneficial by operational staff we spoke to.

We recommend DWP reintroduces regular site visits from Healthcare Professionals to decision makers.

There are a number of ways in which the gathering and utilisation of evidence could be improved that would raise decision making standards and we urge that the Government give consideration to the recommendations outlined. We finish this chapter by considering the role of communications with claimants.

⁷⁷ [DWP Research Report: Decision Making on Employment and Support Allowance Claims. DWP \(2012\)](#)

Role of communications

Effective communication is essential in order to make high quality decisions and enable claimants to understand those decisions. Plausibly, many disputes and appeals could be avoided entirely if claimants were better able to understand both *why* and *how* decisions are reached through better communication. These must be accessible to all in line with the Public Sector Equality Duty, to ensure equal access to redress. We explore here some of the key themes emerging from our consultation with stakeholders.

Letters and postal issues

Format, style and layout of decision letters

Stakeholders told us that letters explaining the reasons for decisions were often difficult to follow and contained too much 'jargon'. Large blocks of continuous text can be difficult to follow and so can prevent the decision form being easily understood.

There is a real need for much less jargon, clearer text and better laid out letters which identify and summarise the key points. Decision – Makers should avoid the terminology which they deploy in writing decisions and appeals. The use of broken text with bold sub headings would greatly enhance the claimant's prospect of being able to understand the reasoning behind the decision.

Advice Plymouth

As discussed above in the context of Mandatory Reconsideration Notices, a table format outlining each contested descriptor, the points awarded and the evidence relied upon could enable claimants and their advisors to better understand decisions made against them.

Clearer communications of what outcomes mean

Claimants assigned to the Work-Related Activity Group (WRAG) are not told in plain English that they have failed to qualify for the Support Group and the reasons for this. This may cause claimants to not understand they have been assigned to the wrong grouping and dispute the decision in time. This is particularly important given current plans to reduce the rate at which ESA (WRAG) is paid to be in line with JSA.

In addition, decision letters should outline the implications of the decision in terms of: how much benefit they will be paid, what expectations will be placed upon them if any and when they will be re-assessed. In situations where the

claimant's condition will not improve, appropriate reassurance should be given with respect to re-assessment.

Post-handling issues

We were told that some changes to mail-handling processes (for example, a change of address to where particular forms should be sent) had sometimes been poorly signposted, resulting in letters/evidence being sent to the wrong place or otherwise not received by DWP.

Many of our clients experience delays in the processing or loss of post related to their benefit claims; this can result in our clients being left without any income for weeks. Priority should be given to improving processes to ensure correspondence is not lost

St Mungo's

Internal re-organisations with DWP on mail-handling have been poorly signposted, and even when known still lead to constant issues of items going missing, even when sent recorded delivery. This leads to delay and expense for individuals and organisations.

Derbyshire County Council

We recommend DWP seek to improve its mail handling processes and signposting of changes.

Copying in of advisors to communications with claimants

A frequent issue raised in the consultation by welfare support workers was the inconsistent manner in which advisors were copied into written communications despite requests for them to do so. This was particularly problematic where there was a risk that claimants might subsequently disengage with the support, for instance those with mental health issues.

We are often excluded from proceedings (for example, we are not sent a copy of a MR notice), even where we have sent the original MR request ourselves and have explicitly requested that we be copied into correspondence. Often, our clients have mental health problems and rely on advice organisations to guide them through the dispute process; if we are excluded from correspondence, this makes things much more difficult for both ourselves and our clients.

Welfare Rights Advisor, Citizens Advice

We recommend that correspondence should always be copied to any advisors supporting the claimant, providing they have given consent.

Telephone calls

A number of issues were raised with respect to the use of telephone communication, an issue the Committee has considered in some detail previously.⁷⁸

Delays in DWP and HMRC answering telephone calls – This is particularly problematic where claimants were calling from mobile phones, incurring considerable cost and deterring claimants from following up their disputes or seeking an update.

Claimants not answering calls from DWP/HMRC – This was identified by both DWP and HMRC staff as being problematic. Considerable time might be used by staff familiarising themselves with a case to make a call to a claimant that is then not answered, resulting in time wasted and the case not progressing. Calls are typically from withheld numbers with no option for the claimant or representative to call the DM back when a call is missed.

We recommend that the Departments explore the feasibility of calling from numbers that are not withheld.

Telephone contact with the claimant directly may not be the best person to speak to - Stakeholders noted in some instances that calling the representative as opposed to the claimant directly may be beneficial for all involved, particularly where the claimant is vulnerable and may struggle with taking the phone call. It would be beneficial to streamline the process whereby representatives can speak on the claimant's behalf with their permission, a process that is currently felt to be time consuming. At HMRC, we understand there is an intermediaries helpline service that advisors can call on behalf of the claimant.

Electronic communications

E-mail

Stakeholders spoke of the need for greater use of e-mail, allowing a direct communication link to be established between welfare rights advisors and decision makers. There are clearly a number of advantages to this.

We recommend that DWP/HMRC should seek to identify the barriers to further use of secure e-mail in dispute resolution.

⁷⁸ [See Telephony in DWP and HMRC: an update. \(2016\)](#)

A number of respondents suggested improving communications by making effective use of secure email to supplement postal communications. The benefits vastly outweigh any perceived risks. This is a free communication tool used by the Tribunal service and local authorities very effectively. It generates evidence of sending, whilst also proving receipts. It also helps ensure that at least outward communication (such as evidence sent by claimants) is kept and not lost.

National Association of Welfare Rights Advisors

At HMRC in the future, secure messages will be exchanged through the Personal Tax Account service which can be used to manage Tax Credits amongst other services. At DWP, the UC online portal will allow for secure electronic messages to be sent and received.

Web chat

In recent times there has been increasing use of live 'web chat' in the delivery of services in the commercial sector. This has a number of advantages for some groups of claimants:

The DWP and HMRC could make more use of secure internet 'chat' facilities where the interaction would be less intimidating and where the claimant gets a better opportunity to read through a comment before responding. Clients with social interaction problems often find the telephone intervention call problematic.

Advice Plymouth

In addition, both parties are able to keep a written record of what was said which is helpful in resolving disagreements. We are pleased to note that HMRC are rolling out such a service.

We recommend the learning from the development of web chat at HMRC is shared with DWP to inform future development of its own web chat service.

Overview

As we have noted in an earlier report on *Communications in the Benefit System*,⁷⁹ the communications challenge for DWP is considerable. Here we have identified a number of ways in which claimant communication can be ineffective, hampering the ability of DMs to carry out their task effectively and for claimants to understand decisions. A movement towards the use of more digital platforms presents opportunities for significantly better claimant communication, despite new risks that the Department must be guarded against.

⁷⁹ [SSAC Occasional Paper 11: Communications in the benefit system, Social Security Advisory Committee \(2013\).](#)

5. Conclusions and Recommendations

Properly conducted, Mandatory Reconsideration could be an efficient process that provides opportunity for timely review, the admission or reinterpretation of evidence and the avoidance of costly tribunals. It is certainly the case that tribunal numbers have fallen and from this perspective the policy may be seen as a success. However, this is only one angle, with much evidence provided from both stakeholders and staff conducting MR that the process does not work as well as it should. We have made a series of recommendations intended to improve the MR process as well as to improve decision making standards more generally.

Processes

We recommend that...

- **We recommend that DWP and HMRC consider whether current time limits for requesting an MR and submitting evidence are conducive to effective evidence gathering.**
- **That HMRC and DWP should examine the feasibility of unifying their processes for requesting an MR.**
- **DWP, informed by evidence from decision makers, give consideration to whether the recent ‘streamlining’ process allows for effective reconsideration, thereby striking the right balance between quantity and quality of MR decisions whilst minimising undue delays**
- **Departments prioritise publishing more MR statistics, setting out a clear timetable for the publication of outcomes data. This applies equally to HMRC where currently no published data are available on outcomes at all.**
- **the Government to publish more data on the waiting periods between requesting an MR and the issuing of an MR notice for the full range of benefits at DWP and HMRC.**
- **that letters to gather evidence at HMRC make clear that further evidence is not required for an MR to progress.**
- **DWP establish a process for identifying any incorrect practice in taking MR requests by telephone and ensuring these are addressed.**

- **Departments ensure that the MR process captures and covers all aspects of a dispute to ensure appellants are able to appeal everything they wish to dispute.**
- **that the National Audit Office (NAO) should examine the Concentrix contract to ensure that at the same time as providing value for money, it has appropriate safeguards to preserve justice for the claimant.**
- **DWP should consider ways to streamline the process whereby assessment rate payment for Employment and Support Allowance is reinstated following the issue of Mandatory Reconsideration Notices**
- **where DWP Work Coaches believe that an individual (who is appealing an ESA fitness for work decision) is too ill to search for work, there could be wider usage of the existing JSA sickness provisions.**

Advice and communications

We recommend that...

- **Departments should identify and address the elements within the appeals process that claimants believe are too complex and consider further steps to help claimants better understand the appeals journey.**
- **DWP should publicise the full range of methods by which an MR can be requested.**
- **time limits for requesting an MR are clearly communicated in both departments.**
- **introduction of a standard form for requesting MR at DWP, which could also be made available for claimants to submit digitally.**
- **the following improvements to Mandatory Reconsideration Notices (MRNs):**
 - a. **that all MRNs are clearly labelled as such to eliminate confusion on behalf of the claimant and HMCTS.**

- b. that the implications of the decision for the claimant are briefly summarised in plain English.**
 - c. that there is signposting to onward appeal rights on the first page of the letter**
 - d. that in order to break down the reasoning of a complex decision (such as one for ESA), a table with a row for each contested descriptor may help the claimant understand the decision.**
- **where claimants are awaiting their MRN, we recommend that DWP provide better information and advice for the claimant in this situation, in particular around:**
 - a. their eligibility for JSA**
 - b. reassurances claiming JSA will not count against their appeal**
 - c. reassurance that any job search requirements are subject to reasonable adjustments given a claimants health problems.**
 - d. when a time target has been introduced, information around how long reconsideration is expected to take and their subsequent eligibility for ESA assessment rate thereafter.**
- **DWP should provide clarity for claimants under what circumstances it will gather evidence for claimants and what expectations are placed upon them at each stage in the decision making process.**
- **DWP seek to improve its mail handling processes and signposting of changes.**
- **correspondence should always be copied to any advisors supporting the claimant, providing they have given consent.**
- **Department(s) explore the feasibility of calling claimants from numbers that are not withheld.**
- **DWP/HMRC should seek to identify the barriers to further use of secure e-mail in dispute resolution.**

- learning from the HMRC web chat pilot is shared with DWP to inform development of its own web chat service in the future.

Training, feedback and organisational learning

We recommend that...

- all training should be reviewed for relevance and to ensure it is fit for purpose in carrying out the work of a DM/Caseworker, working with them to understand their needs.
- DWP and HMRC that DM/Caseworker guidance becomes easier to navigate, with an improved search function and an index - with specific training on effective use of technical guidance.
- DWP reviews the issue of access to Healthcare Professionals for DMs.
- responses to Guidance Queries are accessible in a searchable database.
- DWP seeks to understand why 'Collaborate' is not being used by some DMs and considers ways it can actively encourage online collaboration and sharing of expertise and best practice.
- a review of the Quality Assurance Framework used by DWP and HMRC to establish if it is fit for purpose in evaluating whether decisions are of a high quality.
- that the annual report to the President of the Social Entitlement Chamber is published to improve understanding of how feedback is being used and what improvements are implemented as a result.
- that Decision Makers at DWP and HMRC are made aware of when their decisions are overturned at tribunal (and the reasons for this) to help identify where things could be done differently.
- that the Government consider aspects of the decision making process that could benefit from external oversight and how best this can be carried out.

Medical issues

We recommend that...

- **DWP should provide a copy of the Healthcare Professional Report with all decisions made that find the claimant fit for work so that the claimant can understand the basis on which the decision was made.**
- **DMs should seek to further explore contradictions between reports and other evidence provided.**
- **DWP work with the Department of Health and the devolved administrations to establish a consistent approach to the provision of medical evidence.**
- **DWP seek to further raise awareness with the medical profession about how the benefit system functions and their role within it, and seek to design forms that seek to capture precisely the data required from doctors to determine eligibility.**
- **DWP reintroduces regular site visits from Healthcare Professionals to decision makers.**

We ask that the government carefully consider these recommendations, which we believe will enhance decision-maker quality, deliver savings and enable the policy intent to be fully realised to the benefit of claimants and society more generally.

Annex A: Claimant Journeys

Employment and Support Allowance (ESA)

The ESA application process is designed to determine whether a claimant is fit for work (in which case there is no entitlement to ESA) and, if they are not fit, into which of two possible groups they should be placed - the Work-Related Activity Group (WRAG) or the Support Group. The group into which a claimant is placed affects the rate of benefit paid and the requirements placed on claimants by DWP to look for work in the future, referred to as *conditionality*.

Outcome	Benefit Payable	Conditionality
Fit for Work	Not eligible for ESA, can claim JSA or UC at a rate of £73.10 or £57.90 for under 25's	When claiming JSA or UC, is subject to full conditionality which includes full-time job search requirements
WRAG	£102.15 per week	Attending Work-Focused Interviews
SG	£109.30 per week, plus possible <i>advanced disability premiums</i>	No Conditionality

Making the initial claim for benefit

ESA claimants require a 'fit note' from their GP indicating they are not fit for work. Claimants initially complete an ESA1 form that aims to capture in full all their relevant circumstances and those of any partner where applicable – for example, the composition of the household, details of any earnings, income (including other benefits) and capital, and housing costs. In hard-copy the form runs to 50 pages but it is usually completed by Jobcentre staff during the process of a telephone conversation with the claimant. After the details have been captured the claimant is sent a print-out of the relevant information which they are asked to affirm (confirm?) and sign as true and complete.⁸⁰ If it is identified that the claimant is terminally ill, the claimant is immediately assigned to the Support Group. Otherwise, after seven 'waiting days' have elapsed, the claimant becomes eligible for 'assessment rate' ESA and this is described as the 'assessment phrase' of ESA.

⁸⁰ With this process the date of the ESA claim is the date on which the completed information was provided by telephone rather than the date on which the print-out was signed or the date on which DWP received the signed form in return

Assessing capability for work, the ESA50

During the assessment phase, claimants are issued a *capability for work* questionnaire (ESA50) from the Healthcare Professional (HCP) provider. They are required to fill in and return to the form within a specified time period. This form is 19-pages and asks claimants about:

- Cancer treatment, if a claimant has cancer and is awaiting, undergoing or recovering from chemotherapy/radiotherapy then no further details are required
- In general terms, their health conditions, illnesses and disabilities and how they affect them
- Medication and other treatment undergone
- Physical capabilities
- Mental, cognitive and intellectual capabilities
- Eating and drinking capabilities

Claimants are encouraged to provide any supporting documentary evidence of their conditions, but are told not to gather any new evidence at cost, as the Department will be unable to refund them

The medical

Unless the paperwork presents cogent evidence of severe disability (in which case the claimant should be assigned to the Support Group without further investigation), the claimant will be asked to attend a *Work Capability Assessment*: a face-to-face meeting with the healthcare professional (HCP) in order to establish a clear picture of the claimant's limitations. The HCP is guided and prompted by a piece of software, the *Logic Integrated Medical Assessment* (LiMA) which guides the assessor through the process, and makes recommendations on the basis of inputted data. A medical history is taken, as well as exploring the claimant's 'typical day'. Throughout, the assessor will make general observations about the claimant's physical and mental state, referred to as "informal observations". If further clarification is needed, the HCP may contact the patient's GP. Ultimately the HCP files a report for the benefit of the DWP decision-maker which includes a recommendation as to the most appropriate group to which the claimant should be assigned. It also includes a "prognosis", a recommendation of how long should pass before the claimant is re-assessed, with a maximum period of three years.

How is the group determined?

This depends on whether the assessor believes the claimant has *limited capability for work* and/or *limited capability for work-related activity*

For an assessor to consider claimants to have a *limited capability for work* (LCW) the claimant must score a total of 15 points in accordance with the 17 *functionality descriptors*. These cover a range of physical and mental capabilities from walking and sitting, to hazard awareness and coping with change. Each activity can score 6, 9 or 15 points depending on severity, for example:

Sample Descriptor for the Work Capability Assessment

Activity 3: Reaching

Descriptor:

(a) Cannot raise either arm as if to put something in the top pocket of a coat or jacket.

15 Points

(b) Cannot raise either arm to top of head as if to put on a hat.

9 Points

(c) Cannot raise either arm above head height as if to reach for something.

6 Points

(d) None of the above apply.

0 Points

To be considered to *have limited capability for work-related activity (LCWRA)*, one of a series of descriptors must apply to the claimant: for example: they must decide the claimant “cannot learn how to complete a simple task, such as setting an alarm clock, due to cognitive impairment or mental disorder” or be unable to “turn the pages of a book with either hand”.⁸¹ These descriptors are outlined in legislation⁸².

- If a claimant has LCWRA, they will be recommended for the Support Group
- If the claimant has LCW, but not LCWRA, then they will be recommended to the Work-Related Activity
- If neither applies then they are fit for work.

There are other “non-functional descriptors” which if met can merit inclusion into the Support Group:

⁸¹ http://www.legislation.gov.uk/uksi/2008/794/pdfs/uksi_20080794_290216_en.pdf

⁸² Schedules 2 and 3 of the Employment and Support Allowance Regulations 2008.

1. The claimant is suffering from a life threatening disease in relation to which
 - (a) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure, and
 - (b) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure.

2. The claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.
 - (a) This does not apply where the risk could be reduced by a significant amount by reasonable adjustments being made in the claimant's workplace, or

 - (b) By the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant

The HCP report comes with a recommendation of a group and prognosis on that basis.

Initial decision by DWP Decision Maker

A DWP Decision Maker ultimately decides the group and *re-referral period* of the claimant and should consider the following when making the decision:

- The ESA50 form and any medical evidence provided by the claimant
- The Report of the Healthcare Professional
- Any additional evidence from GPs, through use of form ESA113.
- Any other relevant evidence

Should they require clarification on the medical report, they should contact the medical professional directly. If they are unsure about how to interpret some medical evidence, they are able to contact a HCP on the telephone.

The decision is communicated to claimants over the phone and in writing, with reasons given for the decision made.

The dispute process – Appealing to an independent tribunal

If a claimant is found fit for work, they lose entitlement to the assessment rate ESA. If they disagree with the decision, they must request a *Mandatory Reconsideration* within one month – either by telephone or in writing. This is

a request for the Department to reconsider formally the decision made. At this stage the claimant is asked to provide any additional information and evidence to support their contention that they are not fit for work. Once the department has reconsidered the decision, they will issue a Mandatory Reconsideration Notice (MRN) to the claimant. The claimant must then submit a SSCS1 form to Her Majesty's Courts and Tribunals Service (HMCTS), with the MRN in order to lodge their appeal within one month. Claimants can opt for an oral hearing or for the decision to be made 'on the papers'. At this stage 'assessment rate' ESA can be reinstated until the outcome of the hearing is known.

The hearing

Once an appeal has been lodged, claimants will receive a pack that will contain the following:

- A statement of reasons for the decision made
- Information concerning the relevant law about the benefit claimed
- A copy of their application form
- A copy of the medical report(s) or other evidence obtained by the decision maker to make the decision
- A copy of all evidence submitted by the claimant

At the hearing itself, the panel consists of 2 members; a medical professional and a judge who will seek to determine whether the original decision made was correct. The hearing may be 'adjourned' if the panel decides further evidence is required to make the right decision.

Appealing a tribunal decision

If claimants disagree with the decision made by the tribunal, they are able to escalate this to the higher tribunal if their dispute is on a *point of law*. Due to the technical nature of these disputes, legal expertise and representation is typically necessary. The Government is also able to appeal outcomes they disagree with.

Tax credits

Tax Credits serve to top-up the earnings of low-income individuals and families. Determining precise eligibility can be complex. A range of factors determines entitlement:

- Earnings and the earnings of a partner through work or other sources
- Receipt of other benefits

- Number of hours worked, and whether employed or self-employed
- Number of children, use of childcare and whether children are disabled
- Whether the claimant is disabled

Claimants have an underlying *maximum entitlement rate*, depending on the number of elements for which the claimant is eligible. The maximum entitlement is then reduced by 41 pence for every pound of household income above the *income threshold*, currently set at £6,420.

Making an individual or joint claim

Individuals must first establish whether they should claim as an individual or as part of a 'joint' claim. For the most part this is straight-forward. If claimants are married or living together as if they are married, they are required to claim jointly. There are situations where a joint claim might be required despite not living together, for example if married claimants live apart for work reasons. Similarly there are situations where an individual might be in a couple but would be able to make a claim as a single person: for example if their partner lives abroad.

Determining eligibility and ordering a claim form

Given the complexity of the eligibility criteria, it may not be immediately obvious to claimants if a claim can be made, and if so, how much it will be worth to them. There are two main routes for a claimant to get an estimate of eligibility and order a claim form.

Online

The 'do I qualify?' questionnaire tool available on GOV.UK⁸³ can quickly provide claimants an indication of whether they can get Tax Credits. A more accurate estimate is provided by the *Tax Credit Calculator*⁸⁴ which requires claimants to provide more details of earnings, hours worked, children, disability status etc. This tool provides a better estimate of eligibility, as well as providing an estimate of the total value of the tax credit award up to the end of the current tax year. If eligible, claimants are then required to request a tax credit claim form, which can take up to two weeks to arrive.

Telephone

Claimants can alternately call the Tax Credit Helpline to request a form. Claimants will be required to give basic details (including NINo) and may be asked further questions to advise on their entitlement – though it should be

⁸³ [Do I qualify for Tax Credits? Online tool, HMRC](#)

⁸⁴ [HMRC Tax Credit Calculator, HMRC](#)

noted it is *not* the helpline's role to act as a gatekeeper and a form should be issued to anybody who requests one providing they pass identity checks.

Completing the Tax Credits claim form

Claimants must then complete the *TC600 form* using attached comprehensive guidance. This ten page form aims to capture all details needed for an HMRC decision maker to determine the correct award and includes: Personal Details, Details of Children, Childcare Costs, Work Details, Income Details and Payment Details.

This form is then sent to HMRC to be processed, with a target time of 21 days for new tax credit claims. The latest data indicate the average waiting time in Q4 2015 was 24 days. Once the claim has been processed, a *Tax Credit Award Notice* is sent to the claimant that outlines:

- All the information the claimant provided in their application
- Calculation of the tax credit award and to which elements the claimant is entitled
- Amount and timings of payments up to the end of the current tax year.

This notice is accompanied by form TC602, which includes a checklist that encourages claimants to check that every aspect of the award notice is correct. Claimants have 30 days to report any inaccuracies to HMRC, in order to prevent an overpayment from building up. The claimant is also provided with an extensive list of possible changes in circumstances that, if applicable to them, must be reported to HMRC within a month to ensure the correct amount of tax credit continues to be awarded.

Throughout the life of a tax credit award, HMRC and the claimant should honour the *COP26 responsibilities*, as outlined in the Tax Credit Manual and summarised overleaf

Responsibilities of...	
HMRC	The Claimant
Give the claimant correct advice based on the information given to them	Give HMRC accurate and up to date information when they make or renew their claim
Accurately record the information the claimant provides when making a new or repeat claim and use that information to calculate and pay Tax Credits	Tell HMRC about any changes that occur throughout the year so that HMRC has accurate and up to date information.
Include information the claimant has given them about their family and income. If, in issuing an award notice the claimant advises that the award notice is wrong, correct the mistake and send an amended award notice within 30 days	Use the checklist (TC602) that is sent with each award notice to check all the items listed and tell HMRC within one month of receiving the award notice if anything is wrong, missing, or incomplete.
Not hold the claimant responsible for any overpayment that occurs because they have made a mistake and failed to correct it when the claimant tells them about it	Tell HMRC about changes that must be reported within a month of them occurring.

Whether HMRC will require overpayments to be recovered in the event of error depends on whether the official judges whether the claimants kept their 'side of the deal', and if not if they had good reason for acting as they did. Overpayments which are purely a result of HMRC error are not typically subject to recovery efforts.

Compliance checking

If HMRC holds information which leads them to believe that a claim is incorrect, they can carry out compliance checks in order to investigate any discrepancies. These include but are not limited to:

- Whether a joint claim should be being made (issues of co-habitation)
- Whether stated childcare costs are being paid
- Whether self-employed individuals are engaged in business which is commercial in nature with a view of making a profit.
- Changes in hours and earnings over time

There are a range of *triggers* for a review and both HMRC and their contractor Concentrix who carry out compliance work on their behalf rely on automated

computer systems and matching across a range of data sources including the use of credit reference agencies to identify high-risk cases.

HMRC and Concentrix should work with the claimant to establish the facts and ensure the correct amount is paid, however they are able to stop payments if compelling evidence is not forthcoming from the claimant.

Disputes and appeals

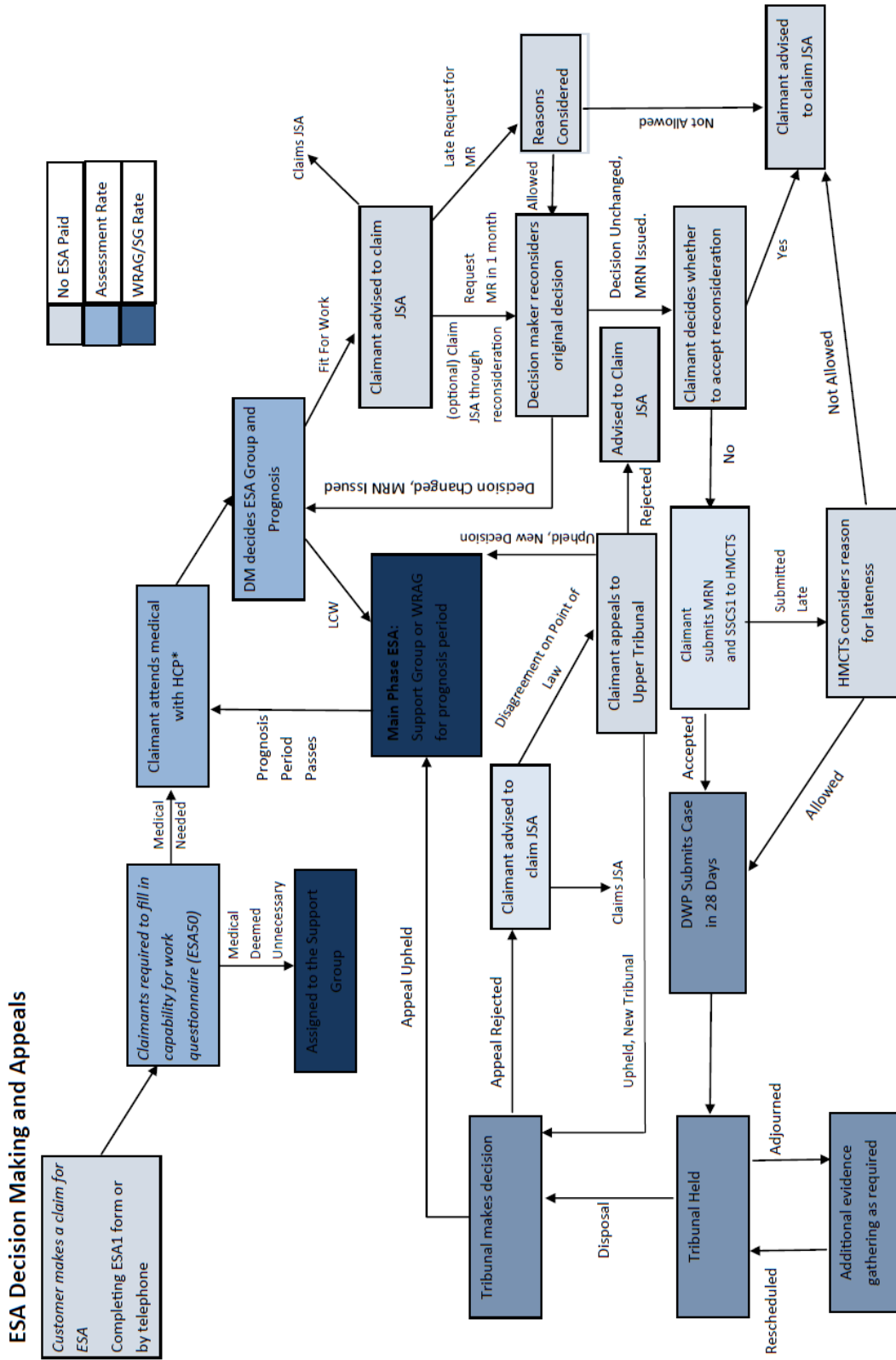
Disagreeing with a decision – making an appeal

Where claimants disagree with a decision made by the tax office, in the first instance they may (but are not compelled to) call the tax credit helpline to seek an explanation of the decision and see if it can be resolved informally. If they remain dissatisfied they must submit a request for a Mandatory Reconsideration in writing within 30 days of the initial decision, either through a standard form available online or a letter, which captures why they disagree with the decision made. Once an MR decision has been made, claimants will then be issued with a *Mandatory Reconsideration Notice* which allows them to lodge an appeal directly with HMCTS.

The process is then identical to that for the ESA appeals journey except that the composition of the tribunal will be the tribunal judge alone and a different form must be submitted to HMCTS – SSCS5 as opposed to SSCS1.

Disagreeing with a decision – raising a dispute

Not all decisions at HMRC come with a right of appeal, for example those relating to the recovery of overpayments. There are situations where claimants agree they have been paid too much, but do not believe they should be liable to repay. In these situations, a *dispute* should be raised instead and should be done so within 3 months of the initial letter, statement or notice which tells them they have been overpaid. Claimants must be able to show that the Tax Credit Office made a mistake, or gave them incorrect advice, and it was reasonable for them to think their payments were correct. A dispute can be raised by letter or by completing form TC846.



***A further medical may not be required upon reassessment; the rate of benefit paid in this period in this case will be the same as what was previously paid until the new decision is reached.**

Annex B: List of consultation respondents

In addition to these organisations listed, we also had responses from 30 individuals including: claimants, academics and those working in the judiciary.

Action for M.E
Action Group, The
Advice Nottingham
Advice Plymouth
AGEUK Plymouth
Child Poverty Action Group
Citizens Advice
Citizens Advice Scotland
Citizens Advice, Craven, Harrogate & District
Citizens Advice, Haddington
Citizens Advice St Helens
Citizens Advice Isle of White
Citizens Advice, Trafford
Citizens Advice, York
Derbyshire County Council
Disability Awareness and Advice Limited
Disability Benefits Consortium
Disability Solutions, West Midlands
Enable Scotland
Equity
Feeding Britain
Gipton Independent Supported Living
Glasgow City Council
Hillingdon Information and Advice Line
Home Group
Inclusion London
Islington Law Centre
Kilburn Unemployed Workers Group
Law for Life
Low Incomes Tax Reform Group
M.E UK
Money Advice Plymouth
Money Matters Advice Service, South Lancashire Council
National Association of Welfare Rights Advisors
National Deaf Childrens Society
Notting Hill Housing
Paddington Law Centre
Parkinson's UK
Peabody Trust

Personal Financial Planning Ltd.
Rights Advice Scotland
Salford Welfare Rights and Debt Advice Service
Scope
Smart Money Advice, Aberdeen
Spartacus Network
St Mungo's
Supporting Communities, Middlesbrough
UK Administrative Justice Institute
The Wheatley Group
Welfare Conditionality Project
West of Scotland Housing Association
YMCA Exeter
Zacchaeus 2000 Trust

Annex C: Literature consulted

Advice Brighton & Hove (October 2014), Mandatory Reconsideration Recommendations. Available at: <http://www.advicebrighton-hove.org.uk/wp-content/uploads/2015/04/Mandatory-Reconsideration.pdf>

Administrative Justice & Tribunals Council (July 2013) *Future Oversight of Administrative Justice*. Available at: [http://ajtc.justice.gov.uk/docs/AJTC_Response_to_JCR_\(07.13\)_web.pdf](http://ajtc.justice.gov.uk/docs/AJTC_Response_to_JCR_(07.13)_web.pdf)

Administrative Justice & Tribunals Council (June 2011) *Response to the Ministry of Justice Consultation document Proposals for the Reform of Legal Aid*. Available at: http://ajtc.justice.gov.uk/docs/Legal_Aid_Response.pdf

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Annex D: Membership of the Social Security Advisory Committee

Paul Gray (Chair)

John Andrews*

Rachael Badger*

Adele Baumgardt

John Ditch*

Colin Godbold

Chris Goulden*

Jim McCormick

Gráinne McKeever

Matthew Oakley*

Seyi Obakin

Judith Paterson

Nicola Smith*⁸⁵

* indicates members of the Committee's Independent Work Programme sub-group.

⁸⁵ Committee member until 30 April 2016

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